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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 13

UNITED GAS PUBLIC SERVICE COMPANY,
Appellant,

v.

STATE OF TEXAS ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

OPINION BELOW

There is only one opinion in this case by the State courts, and that is not officially reported.[1]

[1]The opinion is by the Court of Civil Appeals for the Third Supreme Judicial District of Texas (R. 410), and is unofficially reported 89 S. W. (2d) 1094. No opinion was entered by the trial court. Appellant's motion for rehearing (R. 429) was overruled by the Court of Civil Appeals without opinion (R. 458). The Supreme Court of Texas wrote no opinion when it refused to take the case on writ of error (R. 474, 479). The opinion of the Railroad Commission of Texas (R. 9) is not officially reported, but is to be found in 2 P. U. R. (N. S.) 503.

JURISDICTION

Jurisdiction is asserted under 237 of the Judicial Code, amended; 28 U. S. C. 344 (a). There has been compliance with paragraph 1 of Rule 12 of this Court, as amended March 2, 1936. 297 U. S. 733, 734. An order noting probable jurisdiction was entered April 5, 1937. Appellees' motion to dismiss the appeal was denied May 17, 1937. No. 807, October Term, 1936.

STATEMENT OF THE CASE

Appellant seeks judgment (a) holding confiscatory the order of the Railroad Commission of Texas which reduced the prevailing rate schedule for natural gas for domestic use in the City of Laredo, Texas, and (b) reversing the judgment of the Court of Civil Appeals which upheld the validity of that order and enforced it against appellant by permanent injunction. The questions presented by the appeal are (1) whether the Commission's order is confiscatory, (2) whether federal rights essential for the determination of that issue have been denied to appellant, and (3) whether the State procedure for fixing and for deciding the federal constitutional validity of appellant's gas rates in Laredo, as construed and applied in this case, has been so inadequate and unfair as to deny appellant due process of law and the equal protection of the laws. Section 1, Fourteenth Amendment, Constitution of the United States.

Proceedings Before The Railroad Commission.

The order claimed to be confiscatory was entered by

the Railroad Commission of Texas on June 13, 1933, and decided two appeals taken by appellant[2] under Article 6058, Revised Civil Statutes of Texas, 1925. Appendix 82. The first appeal was from an ordinance of the City of Laredo (R. 7) which reduced domestic rates in Laredo from 75 cents per 1000 cubic feet of natural gas, 10 per cent discount for payment in 10 days, minimum monthly bill $1.00 (R. 10), to 40 cents per 1000 cubic feet[3] (R. 8). This reduction was to become effective January 1, 1932 (R. 9). The appeal was perfected by that date, and the 40 cent ordinance was suspended by the Commission until the appeal was decided (R. 10). The Commission continued the 75 cent rate in effect, appellant giving bond conditioned that it would refund charges in excess of the schedule of domestic gas rates finally determined to be reasonable (R. 411). Appellant's second appeal to the Railroad Commission was from the refusal of the City of Laredo to increase the 75-cent rate (R. 10-11). See Art. 6058, *supra*.

The two appeals were heard by the Commission on one record (R. 9, 11), and were decided by one order dated June 13, 1933 (R. 26). The Commission set aside the 40 cent rate ordinance as unreasonable (R. 427), and denied appellant an increase in the 75 cent rate

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[2]The term appellant is used to designate United Gas Public Service Company and its immediate predecessors in title to the properties involved, namely, Texas Border Gas Company and South Texas Gas Company (R. 10-12).

[3]The minimum monthly bill ($1.00) and the discount for prompt payment (10 per cent) were not changed (R. 8). The ordinance fixed other rates (R. 9) which are not involved, as the Commission set aside these other rates (R. 26).

(R. 26). The Commission fixed the domestic gas rate in Laredo at 55 cents per 1000 cubic feet, 10 per cent penalty for non-payment of monthly bills in 10 days, minimum monthly bill $1.00 (R. 26). The new 55 cent rate was made retroactive to January 1, 1932 (R. 26), appellant being directed to refund such part of its collections after that date as were in excess of what such collections would have been if the 55 cent rate, instead of the 75 cent rate, had been charged from January 1, 1932 (R. 26). An opinion containing the conclusions and findings upon which the order was made constituted part of the order (R. 9-25).

Basic findings of the Commission: The Commission found that (1) "the present fair value of the properties • • • used, and useful in the gathering, transporting, and distributing • • • natural gas within the City of Laredo, Texas," was $885,000 (R. 25), (2) the reasonable annual rates of return and depreciation reserve accrual were 7 per cent (R. 25) and 3 per cent (R. 21) of $885,000 and (3) an average of the revenues and expenses for four fiscal years (July, 1928-July, 1932) constituted "the test period for the computation of the rate structure upon which a fair return is to be predicated" (R. 22-23).*

The Commission did not find that the 75 cent rate was unreasonable (R. 9-25), nor did it find that appel-

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*The hearing before the Commission ended November 14, 1932 (R. 9), the accounting testimony was brought down to July 31, 1932 (R. 201, 218), and the property appraisals were at replacement values (R. 197) as of July 31 and August 1, 1932 (R. 197, 200A, 203-208, 215).

lant's rate of return from January 1, 1932, had been excessive.

Court Proceedings.

TRIAL COURT.

This suit by the State of Texas, its Governor and Attorney General, its Railroad Commisioners, the City of Laredo and its officials, was filed against appellant in the State district court on July 26, 1933 (R. 1). The same day, appellees obtained from that court an order suspending enforcement of the Commission's rate order until final judgment (R. 26-28). This procedure was adopted so as to stay further proceedings in the federal suit in equity which appellant had already filed to enjoin enforcement of the Commission's order as confiscatory[2] (R. 6, 28). Amendment of March 4, 1913, to 266 of the Judicial Code; 37 Stat. 1013; 28 U. S. C. 380. Appellees' motion to stay the federal suit was granted by three federal judges on account of the filing of this suit, the suspension of the rate order herein until final judgment, and the statement of the Attorney General that appellees had no intention of enforcing the rate order until its validity was finally determined (R. 28-30).

This case was tried, commencing March 7, 1934 (R. 389), to a jury demanded by appellees. Appellant's motion to discharge the jury and for decision of all questions by the judge was overruled (R. 52-53).

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[2]The federal suit was against the Railroad Commissioners and City officials (R. 5). The Governor and State Attorney General were named for the limited purpose of receiving notice (R. 33). 266 of the Judicial Code, amended. The State of Texas was not a party (R. 4, 5).

Pleadings:

Appellees' petition was an express declaration upon the Commission's order of June 13, 1933, which order as well as the Commission's opinion was attached to the petition as an exhibit. See exhibit B of plaintiffs' original petition (R. 9-26). With respect to appellant's federal suit, appellees averred that "every constitutional and legal right" of appellant would be "fully safeguarded and protected" in the state court (R. 4-5), where appellees were "desirous of having the constitutional questions" decided instead of in the federal court (R. 6). The final judgment sought was that appellant be permanently enjoined from charging in excess of the 55 cent rate in Laredo (R. 6-7).

Appellant, in its amended answer filed shortly before trial (R. 31), alleged that the present fair value of its property used and useful to serve Laredo exceeded $1,225,000 both in 1932 and in 1933 (R. 39), and that the 75 cent rate and 55 cent rate were each confiscatory. The returns for 1932 and 1933 were set out at the 75 cent rate and after application of the 55 cent rate, when calculated upon the Commission's findings of fair value and depreciation allowance, and when calculated upon the higher property value which appellant claimed to be fair (R. 39-41)[6]. Appellant averred that the order was arbitrarily made, in that the Commission's findings were not supported by evidence, in that its findings were insufficient, and in that those findings that were made did not support the 55 cent rate (R. 31, 35-39). Appellant pleaded that the Commission's action

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[6]Compare bill of complaint, *Prendergast v. New York Telephone Co.* (No. 542, October Term, 1922), 262 U. S. 43, 47-48.

in fixing the 55 cent rate on the average of net revenues for four prior fiscal years (July, 1928-July, 1932) was arbitrary because average operating and economic conditions at Laredo in those prior years were greatly different from such conditions in 1932 and thereafter, and asserted that the Commission's method of estimating the new rate had a direct bearing upon its confiscatory operation (R. 35-39). Appellant alleged that the order was void under the due process and equal protection clauses of the Fourteenth Amendment, Constitution of the United States (R. 41-43). Appellant did not ask affirmative relief, but prayed that appellees' suit be denied (R. 43)[7].

Testimony:

Appellant's accounting and valuation testimony covered the two years involved in the enforcement of the Commission's order when the trial commenced, and was brought down as nearly as possible to the date of trial. This testimony was given in the light of the following local facts:

Municipal: Laredo is located in the southern part of Texas on the Rio Grande River. It has a population variously estimated from over 25,000 (R. 2) to over 30,000 (R. 978). The latitude is about 27½ degrees. The winters are short and mild. The population is largely of Mexican or Spanish-American descent (R. 953, 978). Natural gas has been distributed in Laredo since 1910 (R. 225). The service has a wider use than

[7]Compare appellant's prayer (R. 43) with statement as to the prayer by the Court of Civil Appeals (R. 418).

that of any other public utility in the city (R. 123-124, 177, 190, 626, 669). The city governing body of Laredo has been empowered to regulate gas rates and service within the city limits since 1907. Art. 1119, Revised Civil Statutes, 1925, Acts 1907, p. 217, Sec. 1. See also Sec. 12, Art. 1175 (Appendix 81) pertaining to cities of over 5000 population.

Company: Natural gas service in Laredo was begun by Border Gas Company. This company, from 1910 to April 10, 1928, owned and operated the Laredo distribution system, the pipe lines leading from Laredo to the gas fields, and the field gathering lines leading from the gas wells to the pipe lines (R. 11-12, 247-252, 238A). On April 10, 1928, these properties were sold to South Texas Gas Company, which transferred the Laredo distribution properties to Texas Border Gas Company (R. 12, 238A). South Texas Gas Company and Texas Border Gas Company were owned by what was known as the Moody-Seagraves interests (R. 602-603). About June, 1930, appellant, a company owning and operating other natural gas properties (R. 346), acquired the stock and other securities of these two companies (R. 645), and operated them until October 21, 1932 (R. 11, 12, 238A). At that time title to all the physical properties and other assets of South Texas Gas Company and Texas Border Gas Company, including the Laredo distribution system, pipe lines to Laredo and the field gathering lines, were conveyed to appellant (R. 11, 238A). The stock and mortgage bonds of these two companies which were held by appellant were

canceled at the time of conveyance (R. 244, 282-285, 369-372, 1104-1108).

Source of Gas Supply: For some years before this controversy arose, the gas used in Laredo was obtained from the Carolina-Texas and Jennings fields, each field being about 40 miles by pipe line from Laredo (R. 216B, map). The original source of supply had been Reiser field, which was only about 22 miles from Laredo (R. 225). As the Reiser field was becoming exhausted in 1916 (R. 225), a pipe line was laid from the Laredo main trunk line near Pescadito to the Jennings field (R. 216B, 225). Another pipe line was extended to the Mirando field, and later to the Schott field. The Mirando and Schott fields lasted only a few years (R. 216B, 226-227). The pipe line from the Laredo main trunk line to the Carolina-Texas field was started in 1922 and completed in 1923 (R. 216B, 226-227).

The gas fields in this area are numerous, but the "pools," or gas sands, are small in area and comparatively short-lived (R. 705). The wells "go dead," *i. e.*, fill with water, at fairly high pressures (R. 351-352).* In March, 1934, the gas was being drawn from the Carolina-Texas field by two companies and the field was approaching depletion (R. 127-128, 349-356, 359). The larger number of producing wells in the Jennings

*At the time of trial, the situation in the Carolina-Texas field was that the 3000-foot sand was entirely depleted (R. 355); in the 2600-foot sand, there were 4 producing wells and 5 which had gone dead at an average pressure of 192.5 pounds (R. 352); in the 2200-foot sand, 6 wells were producing and 2 had gone dead at an average pressure of 280 pounds (R. 352); and in the 2000-foot sand, 4 wells were producing and 16 wells had gone dead at an average pressure of 310 pounds (R. 351-352).

area were on the east side of the field (R. 216B, map), and the pressure of these wells was getting low (R. 649-650). It was appellant's plan, as the gas in Carolina-Texas and Jennings areas became exhausted, to serve Laredo through the pipe line extending from the Carolina-Texas field to the Cole-Bruni field and by extending the Pescadito-Jennings line to the Martinez field, about 10 miles southeast of Jennings (R. 216B, 353).

Property inventoried for appraisal: Appellant inventoried the Laredo distribution system, the pipe lines extending from the Carolina-Texas and Jennings fields and terminating in Laredo, and the field gathering lines* (R. 145-149). A copy of this inventory was furnished to appellees (R. 146), and inventory differences were reconciled (R. 297).

Used and Useful Property: Property jointly used for service both inside and outside the Laredo city limits was included in the inventory and separately appraised. The prorata part of the appraisal of these items—prorated according to use—was included in appellant's valuation exhibits. See defendant's exhibit 9 (R. 151-152); defendant's exhibit 12 (R. 174-175).

The pipe line extending to the Jennings field and feeding into the Laredo main truck line near Pescadito (R. 216B) developed excessive leakage in 1931 (R. 360). The leakage was principally in two "hot spots," *i. e.*, corrosive soil areas (R. 128-129). This line

*The Carolina-Texas field gathering system was leased from Southern Gas Company, and was not included in the inventory or the appraisals (R. 23, 157, 321).

was taken out of regular service until the sections running through these "hot spots" could be reconditioned (R. 359-360). The line was put back into regular service only once during the 12 months ended July, 1932. That was in March, 1932, when a blowup occurred in the line to the Carolina-Texas field (R. 231, 158). The Jennings line kept Laredo in gas until the Carolina-Texas line was repaired (R. 231). During the summer of 1933 the reconditioning work was completed, except that on the north end of the line between mile posts 27 and 30 (R. 359-360, 682, 704, 316-318). The Jennings line was put back into regular service during the fall of 1933 (R. 121-122, 127), and was then capable of carrying safe working pressures of from 200 to 250 pounds (R. 140). The material for the remaining reconditioning work was on the ground at the time of trial, and with the completion of that work the Jennings line would be in very satisfactory working condition (R. 360).

Revenues from industrial and commercial gas sales: The practice before the Commission was to credit receipts from industrial and commercial sales to gross operating revenues and ascertain appellant's over-all rate of return (R. 201, 218)[10]. An electric generating plant of Central Power & Light Company was located inside the city limits of Laredo at the time of this controversy (R. 110-111, 616-617). For a number of years

[10]The ordinance rates for industrial and commercial sales for fuel (R. 9) were set aside by the Commission (R. 26). There is no statute of Texas requiring or permitting the price of other industrial and commercial fuels, such as fuel oil, coal and coke, to be regulated.

appellant had sold large quantities of gas as fuel to operate this power plant (R. 105). During 1931, the power company completed a new electric transmission system, interconnected so as to serve Laredo and a number of other cities in the southern part of the State (R. 106). The electric energy for this new system was generated by four plants, all newer and more efficient than the plant in the city limits of Laredo (R. 109). The Laredo power plant was taken out of regular operation because it was obsolete and inefficient (R. 109, 110-111, 616-617). The plant was not to be operated thereafter, except as a stand-by unit in emergencies (R. 109). The gas required for emergency operation was nominal, such sales amounting to $54.40 in 1933 (R. 88C, 107, 109).

An oil refinery at Laredo, Motor Fuel Products Company, was closed in 1931 on account of operating losses of over a half million dollars (R. 110). These operating losses were encountered because of the low gasoline content of the crude oil available for refining, because the Laredo area did not provide an adequate market for the refined products, and because the refinery at Laredo could not compete with other refineries for other markets due to higher transportation charges from Laredo to those markets (R. 112). For several years before this refinery closed, appellant had sold it substantial quantities of gas for fuel (R. 113).

Accounting records: The early records of the old Border Gas Company were inaccurate and incomplete (R. 15, 99, 781-789). Appellant's district office and general office records were kept in the regular course

of business, were audited annually by an independent firm of auditors, and were the source of all company accounting information, as well as all reports to governmental agencies (R. 68). The expense of field and local operations, such as transmission and distribution system operations and maintenance, meter reading, customer's billing and collections, local advertising and new business expense, were recorded on the district books of account, Laredo being a distribution district operating point (R. 70-73, 80-83, 222-224). All administrative and executive salaries and expenses, from local and district managers up, were carried on the general office books of account at Houston, Texas (R. 74-75, 222-224). Part of the operating functions were performed from or by the general office at Houston, including all valuations, insurance and safety, construction accounting, general accounting, maintenance and operation of telephone lines, gas dispatching and tax and certain administration, medical, engineering, legal, new business and advertising (R. 73-78, 100-101, 222-224). Appellant served gas in a number of other cities and towns (R. 346), and operated several other gas companies. Each kind of general office expense was prorated in accordance with a separate study of the factors causing that expense (R. 73-78). See defendant's exhibit 2 (R. 1137-1200)." Appellees' repre-

"The proration factors were the result of careful study. For example, both insurance and employees and public safety were handled by one department. Studies disclosed that this department devoted 43.7 per cent of its time to insurance, the remainder to safety. Salaries and expenses for handling insurance were prorated according to the amount of premiums. Safety included the handling of workmen's compensation insurance coverage

resentatives had free access to all appellant's records at all times (R. 813-814).

Accounting and valuation testimony: Appellees made out their prima facie case by introducing the Commission's order, including the opinion (R. 64; see folios 18-48, R. 9-26).

Appellant proved that at prevailing rates, its net operating revenues in Laredo, before providing for depreciation, were $58,776.01 in 1932 (R. 69), and $38,932.60 in 1933 (R. 79), and that after providing 3 per cent of $885,000 for depreciation, and computing domestic gas sales at the 55 cent rate, appellant's net return would be $10,086.25 for 1932, and a deficit of $8,114.19 for 1933 (R. 93). The non-recurring revenues from sales of gas for industrial fuel to Central Power and Light Company and Motor Fuel Products Company were shown both for the four prior fiscal years (July, 1928-July, 1932), upon the revenues of which the Commission had estimated the 55 cent rate (R. 22, 23), and for the years involved in the enforcement of the Commission's order, 1932 and 1933 (R. 88A-88C).

Appellant introduced the inventory of property used to serve Laredo (*supra* p. 10), appraised so as to show

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11—*Continued*—
and claims, as well as other safety work. That expense was related both to hazards and to the number of employees. The salaries and expenses for safety were divided according to workmen's compensation premiums and number of employees, each factor given equal weight (R. 1166-1167). Telephone lines are used in dispatching gas. Some telephone lines were owned, others leased. Costs of operating telephone lines were prorated according to mileage of owned and leased lines (R. 1175). But telephone line maintenance expense was prorated on the basis of mileage of owned lines only (R. 1191).

reproduction cost at prices prevailing August, 1932, less depreciation (R. 151-155, 159-166), and also appraised to show reproduction cost as of December, 1933, less depreciation (R. 174-175). Reproduction cost less depreciation before including going value was shown to be $1,071,179 for 1932 (R. 152), $1,097,318 for 1933 (R. 175), and after including going value, $1,191,179 for 1932 and $1,217,318 for 1933 (R. 152, 175, 178, 191).

In rebuttal, appellees introduced testimony showing that net revenues from sales of gas in Laredo at prevailing rates, without applying the 55 cent rate and without making any deduction for depreciation or income tax, were as follows:

Twelve Months Ended:	Including Non-recurring Revenues (R. 253)	Excluding Non-recurring Revenues and Gas Purchases (R. 291)
June, 1929 . . .	$149,452.24	$104,148.59
June, 1930 . . .	162,331.42	100,257.84
June, 1931 . . .	129,347,66	94,206.71
July, 1932 . . .	80,308.47	69,086.63
December, 1933 .	65,524.16	65,469.76

Compare defendant's exhibit 5 (R. 88A-88C).

Appellees introduced an exhibit styled "United Gas Public Service Company—Historical Cost of Fixed Capital—Old South Texas Gas Company and Texas Border Gas Company Systems, Excluding Jennings to Roma Transmission System Property" (R. 237). The opening entry to fixed capital on the books of the old Border Gas Company was eliminated by appellees' accountant in setting up the figures shown by this exhibit (R. 246-252). This opening entry was $550,000 (R. 249). There was substituted therefor $166,996.68 (R.

238A, 250), which was the starting figure of the computation upon which Border Gas Company claimed depreciation for income tax purposes (R. 250). No attempt was made to segregate the fixed capital accounts so as to show the investment for property used only to serve gas within the city limits of Laredo. Fixed capital as shown by appellees' said exhibit, after deducting all investment for property which had been retired, was $1,153,232.98 as of December 31, 1932, and $1,151,993.65 on December 31, 1933 (R. 237).

Appellees introduced an appraisal of *part* of the property included in the agreed inventory (R. 297) and used to serve Laredo (R. 302, 316, 321). The appraisal was on the basis of prices of December, 1933 (R. 297), and amounted to $690,261 before certain minor corrections (R. 299), and $698,047 after these corrections were made (R. 330).

Verdict and Judgment:

The trial court refused to submit the case to the jury in a way which would permit the facts to be found (R. 372-379, 383-387). The charge to the jury consisted of definition of terms and one question, as follows (R. 380-382):

> "SPECIAL ISSUE No. 1. Do you find that the order of the Railroad Commission of Texas bearing date June 13, 1933, providing for a fifty-five-cent gas rate to residential consumers within the city of Laredo, Texas, under the facts introduced in evidence before you, is unreasonable and unjust as to defendant, United Gas Public Service Company? Answer this question 'Yes,' or 'No'." (R. 382.)

The jury answered this question "No" (R. 387). Judgment was entered April 24, 1934 (R. 389). Although the charge and verdict were recited in the judgment (R. 390), the refund provision of the order (R. 26) was declared invalid and the order was held unenforceable for 1932 and 1933 and down to date of judgment (R. 390-391). However, appellant was enjoined from thereafter charging in excess of the 55 cent rate in Laredo, unless the Commission's order was changed or modified (R. 391). The order staying enforcement of the 55 cent rate was dissolved (R. 391). Appellant's motion for new trial (R. 392-400) was overruled on the day the judgment was entered (R. 401).

COURT OF CIVIL APPEALS

Appellant duly appealed to the Court of Civil Appeals (R. 401-402).

Errors Assigned: Appellant asserted that the evidence in the record most favorable to appellees showed that the Commission's order was confiscatory from January 1, 1932, to the date of trial (Assignments 3, 6, 7 and 9, R. 403-405); that the 55 cent rate was fixed on the assumption that appellant's net revenues from January 1, 1932, would be equal to the average of its revenues in the four fiscal years July, 1928-July, 1932, and that the undisputed evidence showed this assumption to be incorrect (Assignments 2, 5 and 10, R. 403, 404, 406); and since all the proof showed that the 75 cent rate had not produced just compensation from January 1, 1932, down to the time of the trial, it was

beyond the power of the Commission to impose the lower 55 cent rate (Assignments 1, 4, 8, R. 403-405). Upon these grounds, appellant sought reversal and rendition of the judgment below (R. 414)[12].

As grounds for reversal and remand, appellant asserted error under the state law in refusing to submit the case on special issues. Submission on special issues was the only method by which findings of fact could be secured in a jury trial (Assignments 10-14, R. 406-407)[13]. The manner in which the case was submitted to the jury was assigned as denying appellant a trial in accordance with due process of law on its defenses of confiscation under the Federal Constitution (Assignment 18, R. 407). Further error was assigned to the manner of submitting the case to the jury, in that appellant was thereby denied knowledge of the grounds for the verdict and of the grounds for any judgment based thereon, and was prevented thereby from reserving for state and federal appellate review questions as to the existence of evidence to support the judgment (Assignment 19, R. 407). Appellant also assigned error in that the action of the trial court in rendering judg-

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[12]See appellant's motion for rehearing (R. 429-434), showing that Assignments 1-10 were submitted in the Court of Civil Appeals as similarly numbered propositions.

[13]Under Article 2189, Revised Civil Statutes (Appendix 85), a request for submission on special issues is mandatory, and it is reversible error to require a jury to determine by one answer two or more issues of fact. *Fox v. Dallas Hotel Co.*, 111 Tex. 461, 475-477. The reasonableness of a legislative act is a question of law for the court, and if such question involves disputed facts, those fact issues are to be resolved by the jury in a jury trial, and the question of reasonableness then determined by the judge from the facts as found by the jury. *Missouri, Kansas & Texas R'y Co. v. District*, 117 Tex. 34, 50-51.

ment on the verdict of the jury constituted an attempted delegation to a jury of the power to decide, as a matter of law, whether the Commission's order was repugnant to the Federal Constitution (R. 407). The refusal to submit to the jury each of appellant's specially requested issues on property value, so that findings of fact could be had upon the claim that the Commission had undervalued appellant's property, was also assigned (R. 408-410).

Opinion:

The Court of Civil Appeals first made its statement of the case (R. 410-414). Then, before reviewing any of the testimony, the Court of Civil Appeals announced (R. 414):

> "We have reached the conclusion * * * that when viewed in the light of the presumption in favor of the validity of the Commission's rate order, and of the quantum and character of proof required to overcome such presumption, the evidence adduced was insufficient, as a matter of law, to show that the 55c rate order was * * * confiscatory. In view of this conclusion, all questions of practice * * * go out of the case."[14]

[14]These so-called questions of practice included the assignments upon denial of a trial in accordance with due process, upon denial of an opportunity to know the grounds of judgment, and upon refusal of the trial court to permit the facts to be found. Of course, these were matters of substance, and not of practice, as stated by the Court of Civil Appeals. See the statement in the opinion (R. 414) that "Part II" of the brief presented appellant's propositions 11 to 79, and compare Assignments 10 *et seq.* (R. 406-410) with appellants' motion for rehearing (R. 448-453) showing that appellant's Assignments 11-79 were presented as similarly numbered propositions.

From this conclusion (R. 414), down to the point where the Court of Civil Appeals attempted to reframe appellant's propositions 1-10 (R. 420), the opinion consists almost entirely of testimony offered by appellees, or of matters not supported by the record. Appellant's claim of confiscation from undervaluation of its property was touched upon only in the following sentence: "Appellant's witnesses placed its value at slightly over one million dollars" (R. 415), and this claim was not mentioned or considered thereafter.

The Court of Civil Appeals said that appellant, by propositions 1 to 10, was contending that the Commission's order was confiscatory "on two grounds, as follows" (R. 420). Then grounds numbered 1 and 2 were set out (R. 420-421). Neither ground 1 nor ground 2, as stated by the Court of Civil Appeals, covers appellant's assignments asserting that the 55 cent rate was shown by the undisputed evidence in this record to be confiscatory in its operation from the order's effective date to the time of trial. See Assignments 3, 6, 7 and 9 (R. 403-405); and compare motion for rehearing (R. 429-433).

Rules announced for determining appellant's claims of confiscation: The court stated the following rules:

> "The rule is settled that rates are not based upon the results of business of any one year alone, but upon what is estimated as being the average business over a period of years * * *. The reason for the rule is * * * that any business may fluctuate from year to year because of changing conditions or circumstances * * *; ordinarily, a test of five years or more next preceding the in-

quiry, if available, is selected. It is also the rule that only actual experience under the rate complained of can furnish any real criterion or guide as to the effect of the rate on the business; and that this experience should be obtained by a practical test for such a period of time as will under the facts of the particular business determine the matters which are of doubtful or uncertain influence. In absence of an actual test of the rate, the court on appeal must resolve all doubts against the complaining party; pare down valuations unsparingly; and the rate must appear to be clearly confiscatory, * * * before the court should by injunction restrain its enforcement in advance of actual experience of the practical results of the rate. And while the equal protection, the due course and the due process clauses of the fundamental laws of both state and nation guard against * * * compelling of the use of private property for public service without just compensation, still they do not assure the public utility the right under all conditions and circumstances to have a return upon the value of the property so used" (R. 421-422).

Interpretation and practical application of the rules announced: The Court of Civil Appeals found that appellant had not put the 55 cent rate to a test by actually charging that rate, but had "continuously charged and collected the 75c rate" (R. 422). The court said that "an actual test of the lower rate might have resulted in a larger return, by bringing about an increase in appellant's business" (R. 422), and that "this court would not be warranted in holding the lower rate was * * * confiscatory, * * * in advance of an actual test of the rate; but that under the aforementioned rules as applied to the facts, appellant

failed, as a matter of law, to show the rate * * * confiscatory * * *."

The alternative rule that the court on appeal must resolve all doubts against appellant and pare down valuations unsparingly (R. 421) in the absence of proof of the required character (R. 414) *i. e.*, confiscation in fact from actually charging the 55 cent rate (R. 421), was applied in this way:

> "The auditor for Laredo showed * * * that the average net revenue for the 5-year period used in the trial court, less annual depreciation of 3% on the $885,000 valuation of appellant's property, would yield an average annual return of 8.46%. If under the rule that in absence of any actual test of the new rate, the court must resolve all doubts against appellant, and pare down unsparingly valuations, and if the lowest valuation shown by the evidence (about $700,000) is used in the calculation, then the average net return received by appellant under the existing rate for the 5-year period, would yield an average annual return of more than 10%. The same calculations of the auditor also show that if the average net revenues for the 4-year period used in the hearing before the Commission are utilized, such revenues, less 3% on the $885,000 valuation of appellant's property, would yield an average annual return of 9.47%. If the lower $700,000 valuation is used in the calculation, the average net revenues for the 4-year period would yield a return of more than 11%. * * * And manifestly the evidence of appellant did not show, as a matter of law, that the lower 55c rate would necessarily result in confiscation of its property; * * * when viewed in the light of aforementioned rules with regard to the quantum and character of proof required in such cases" (R. 425).

The lower court closed its opinion by interpreting the state statute (Art. 6058) under which appellant's appeals to the Commission had been taken (*supra* p. 3). The court held that while the express terms of the statute did not give the Commission the power to make the 55 cent rate retroactive or to require refunds, the statute was to be so construed as to include those powers (R. 427-428). The judgment below was reformed to enforce the 55 cent rate by refunds from January 1, 1932, and as so reformed, was affirmed (R. 428, 429). Whether, on the facts shown in this record, the Federal Constitution forbade the application of the refund provisions of *this order* was not considered (R. 425-428). Appellant's motion for rehearing (R. 429-457) was overruled without opinion (R. 458).

Attempts to Secure Further Appellate Review

The Supreme Court of Texas refused to grant writ of error, no opinion being written (R. 474, 479). The Chief Justice of the Court of Civil Appeals declined to allow an appeal to this court (R. 482-483). This appeal was allowed by order dated January 16, 1937 (R. 513-514).

SPECIFICATION OF ERRORS

Appellant intends to urge all except paragraph 4 of its Assignment of Errors (R. 511, 1408). These errors will be presented in argument under the following headings, each of which is germane to the assignment or assignments referred to in the margin:

I. Confiscation has been conclusively shown.[15]

[15]1. The Court of Civil Appeals erred in refusing to hold said order confiscatory upon the evidence of its actual operation from

II. The finding by the court below as to 1933 net return after enforcement of the 55 cent rate was wholly unsupported.[16]

III. The state court refused to pass upon appellant's claim of confiscation arising from the Commission's undervaluation of its property.[17]

IV. The retroactive refund provision of the Com-

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[15]—*Continued*—
its effective date (January 1, 1932), the record made at the trial (March, 1934) showing, when only that testimony most favorable to the order is considered, that its enforcement will limit appellant to a net return of 1-1/10 per cent for 1932, and to a net return of 2-1/10 per cent for 1933, when computed upon the rate base ($885,000 fixed as of August, 1932) and after providing the accrual to depreciation reserve (3 per cent per annum of $885,000), which were found and entered by the Commission as part of said order (R. 510, 1407).

13. And the said Court of Civil Appeals erred in refusing to hold said order void upon the evidence of its actual operation and effect presented in this case, which evidence showed without dispute that enforcement of the order will take appellant's property without due process of law, compel the use thereof without just compensation and deny appellant the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 513, 1410).

[16]6. The Court of Civil Appeals erred in concluding that the enforcement of the order for 1933 would leave appellant a net return of more than 7 per cent of $700,000, such conclusion being contrary to all the evidence and wholly unsupported by any evidence in the record (R. 511, 1408).

[17]3. The Court of Civil Appeals erred in refusing to require the trial court to determine and pass upon, and in refusing to determine and pass upon itself, appellant's claim of confiscation arising from its plea, properly presented and supported by substantial evidence, that the rate base ($885,000) used by the Commission in making said order was an arbitrary and unlawful understatement of the fair value of appellant's property used and useful to furnish gas service for Laredo (R. 510, 1408).

mission's order was upheld without finding the facts essential to determine the effect upon appellant's constitutional rights.[18]

V. The holding that the evidence was insufficient, as a matter of law, to show confiscation—in so far as the holding was upon evidence—was based upon consideration of only certain testimony offered by appellees.[19]

VI. The lowest appraisal estimate to be found in the record was used as the basis for such calculations of return as were made in the state appellate court.[20]

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[18]11. The Court of Civil Appeals erred in enforcing the retroactive refund provisions of the order in respect of appellant's completed operations of 1932 and 1933, without findings of fact—and without competent evidence as the basis for findings such as would support such action, if any findings were made—upon fair value, reasonable rates of return and depreciation reserve accrual, and net earnings before and after the enforcement of the order for said years (R. 512, 1410).

[19]5. The Court of Civil Appeals erred in holding that the evidence was insufficient, as a matter of law, to show that the Commissioner's order was confiscatory, because such holding was made, in so far as it was based upon evidence, upon consideration of only certain portions of the testimony offered by appellees, and not by considering, weighing and passing upon, in the exercise of independent judgment as to facts and law, all of the facts pertinent to confiscation established by competent evidence (R. 511, 1408).

[20]9. The Court of Civil Appeals erred in computing appellant's supposed rate of return, both for 1933 and as represented by such average revenue calculations, upon a figure of $700,000 for rate base, such $700,000 figure representing the lowest valuation estimated by any witness at the trial and being offered by an engineer witness for appellees as showing estimated reproduction cost, less depreciation, at the end of 1933, the court erroneously refusing to decide confiscation from a judicial determination of fair value made in the exercise of independent judgment applied to all competent evidence thereof (R. 512, 1409).

VII. Controlling weight was given to revenues of four prior years at the 75 cent rate in deciding that the evidence was insufficient to show that the 55 cent rate was confiscatory.[21]

VIII. Because the new, lower, retroactively effective rate had not been put to an actual test, appellant's evidence was held, as a matter of law, insufficient to show confiscation.[22]

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[21]7. The Court of Civil Appeals erred in giving controlling effect to calculations—first made in the Court of Civil Appeals—purporting to show an average of gross revenues, operating expenses, and net revenues at the 75 cent rate for a period of four prior fiscal years (July 1928-July 1932), and in using such average for the purpose of predicting the effect of said final order upon appellant's revenues subject to regulation thereby, all the evidence at the trial showing that the application of said order to appellant's actual operations since January 1, 1932, will clearly result in confiscation of appellant's property, and all of the evidence further showing that the conditions affecting appellant's business during the four prior years used for said averages were greatly different from such conditions prevailing at and after the order is made effective (R. 511, 1408-1409).

8. The Court of Civil Appeals erred, in connection with such calculations, in arbitrarily eliminating therefrom large outlays for operating expenses actually and in good faith incurred in said four prior fiscal years, without any competent evidence in the record to support such elimination (R. 512, 1409).

[22]10. The Court of Civil Appeals erred in holding that, appellant not having put the 55 cent rate to a test, the evidence was insufficient to show confiscation, despite the fact that the record herein shows without dispute that the 75 cent rate was itself confiscatory, it yielding, upon the testimony most favorable to the order and upon the $885,000 rate base and 3 per cent depreciation reserve accrual found by the Commission, a net return of only 3-6/10 per cent for 1932 and of only 4-4/10 per cent for 1933, and despite the showing in the record that a test of said 55 cent rate, in the usual meaning of that term, was rendered impossible by the retroactive operation of the rate order and by the stay order entered in this suit at the instance of appellees (R. 512, 1409-1410).

2. The Court of Civil Appeals erred in treating the presump-

IX. The court below failed to give appellant that independent consideration of both the facts and the law which is essential to the proper judicial review of a rate order claimed to be confiscatory.[23]

ARGUMENT

Summary of Argument.

The order reducing appellant's rates from 75 cents to 55 cents per 1000 cubic feet of gas was not entered until June 13, 1933, but the new rate was made effective January 1, 1932. The trial commenced in early March, 1934. The evidence was brought as nearly as practicable to the date of trial, it covering appellant's operations for 1932 and 1933 and the local conditions obtaining in those years. Taking as the rate base the $885,000 present fair value fixed by the Commission, using its annual depreciation allowance of 3 per cent, and using only the operating figures shown by undisputed evidence, or by the testimony most favorable to

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[22]—*Continued*—
tion in favor of the validity of the Commission's order as irrebuttable by the undisputed evidence showing that, upon the Commission's own findings of property value and depreciation accrual, the enforcement of the order will clearly deny appellant just compensation for the use of its property during the two years between the effective date of the order and the time of trial (R. 510, 1408).

[23]12. The Court of Civil Appeals erred in failing and refusing to give appellant that independent consideration of both the facts and the law which is essential to a proper judicial review of a rate order claimed to be confiscatory, if appellant is to be afforded the equal protection of the laws and due process of law guaranteed appellant by Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 512, 1410).

the order, the enforcement of the 55 cent rate would leave appellant a net return of 1-1/10 per cent for 1932 and of 2-1/10 per cent for 1933. Thus the order seeking to impose the new rate was shown by unimpeachable evidence to be confiscatory upon the Commission's own findings.

The Court of Civil Appeals' only calculation of the result of enforcing the 55 cent rate was for the year 1933. As to this calculation, the Court said that the lower rate would afford appellant a net return for 1933 of more than 7 per cent, based on a valuation of $700,000. No combination of figures in the record will produce such a result. Using Commission findings and only the testimony most favorable to the Commission's order, the highest return for 1933 at the 55-cent rate would be 2-8/10 per cent of $700,000. The Court refused to correct this overcalculation when pointed out to it by motion for rehearing. Nor did it try to learn the effect of the 55 cent rate for 1932. Calculated on the most favorable testimony, appellant's net return for 1932 at the 55 cent rate would be only 1-7/10 per cent of $700,000.

The Commission valued appellant's land, distribution lines, transmission lines and all its other property and equipment at $885,000, and refused to make separate findings as to the principal items entering into this valuation. To prove that this lump-sum valuation was entirely inadequate, appellant introduced evidence of the value of each classification of property used to render the service, and showed that the total amounted to much more than $885,000. Appellant's evidence was substantial, and was of the kind universally held perti-

nent to show the fair value of public utility property for rate purposes. The Court of Civil Appeals refused to give any consideration whatever to this evidence, or to make or require findings based upon it, and thereby failed to perform its judicial duty with respect to a matter upon which the preservation of appellant's federal constitutional rights depended.

The trial court refused to uphold the Commission in ordering appellant to refund the excess over what collections would have been, had the 55 cent rate been charged from January 1, 1932. On October 30, 1935, the Court of Civil Appeals reformed the judgment of the trial court so as to require such refunds. The undisputed evidence showed that the Commission's order as enforced by this reformed judgment would confiscate the use of appellant's property for 1932 and 1933. The Court of Civil Appeals ignored and made no findings based on this evidence. The record was closed when the judgment of the trial court was entered in April, 1934. The record on appeal did not and could not disclose the facts with respect to appellant's operations and the result of enforcing the 55 cent rate in 1934 and 1935. As to these years, the Court of Civil Appeals acted without evidence. The Court's duty to give effect to what was established by proof, to act only upon appropriate findings supported by evidence and thus to determine whether the Constitution prohibited this enforcement of the 55 cent rate, was not performed.

In reaching the conclusion that the evidence was insufficient, as a matter of law, to show confiscation, the Court of Civil Appeals gave no consideration to appellant's evidence, and only part of the testimony in-

troduced by appellees was used. This was not the independent judicial review as to both law and facts assured to appellant by the due process clause.

$700,000—not $885,000—was the basis of such calculations of return as were made by the Court of Civil Appeals. $700,000 was the property appraisal of the only engineering witness produced by appellees at the trial, and this appraisal estimate was selected solely because it was the lowest figure to which any valuation witness had testified. The Court adopted this figure without considering how the appraisal was made, the competency of the witness to make a reliable appraisal, or the reasons offered to support it. The opinion of this one witness was made absolutely conclusive, not only against all other proof of property value whatsoever, but against the Commission's present fair value finding of $885,000 on which the 55 cent rate was based.

The $700,000 appraisal did not include the pipe line to the Jennings field. The estimate was at prices of December, 1933, after deducting depreciation which had occurred by the end of that year. On the basis of $700,000, the Court of Civil Appeals computed the rate of return represented by two averages of purported net revenues. The first average covered the four fiscal years July, 1928-July, 1932, and the calendar year 1933. The second average covered the four fiscal years. Both were mathematical averages, each year being given equal weight. All revenues were at the 75 cent rate. The 55 cent rate was not applied. The average operating and economic conditions at Laredo over the four fiscal years were greatly different from conditions in the period as to which the Commission sought to impose the 55 cent

rate. These mathematical averages gave controlling weight to the purported earnings of the four prior fiscal years. Appellant's claim was that the 55 cent rate would confiscate the use of its property by depriving it of just compensation for service rendered from January 1, 1932. The averages were delusive, and their use to uphold the Commission was to employ past earnings to impose present confiscation. The rate of earnings in one economic era is not to be decided on the basis of valuation as of a different era. The prior earnings used as the basis for prophesying a new rate are not to control over operations to which the new rate applies. The Court of Civil Appeals preferred prophecy to the event. Its method of determining confiscation in fact is unknown to the law.

The Court of Civil Appeals sought to justify these acts by holding that in the absence of an actual test of the reduced rate an appellate court deciding confiscation *vel non* must pare down values unsparingly and resolve all doubts against the complaining party. The so-called "test" cases cited by the Court are inapplicable. Here, the 75 cent rate, which had been in effect since 1921, had become confiscatory by 1932, it yielding on the Commission's rate base, after providing 3 per cent thereof for depreciation, a net return of 3-6/10 per cent in 1932, and of 4-6/10 per cent in 1933, using only the testimony of operations showing the highest percentage of return. The 55 cent rate was not in existence until June, 1933, and was suspended in July, 1933 until final judgment in this suit. Under these facts, appellant could produce neither the kind nor quantity of proof the Court's ruling required. Under the

ruling, the presumption in favor of the Commission's action was made irrebuttable, as that presumption could be overcome only by proof impossible to produce. This was to hold that, to get the protection the Constitution affords, the rights sought to be protected must be surrendered.

The Commission's order has been shown confiscatory in its actual operation by proof not fairly open to debate. But apart from that showing, the arbitrary refusal of the Court of Civil Appeals to consider appellant's evidence of confiscation and of fair value, its imposition of refunds by completely ignoring the undisputed evidence disclosing the confiscatory result, its imposition of refunds for years as to which the record on appeal could contain no proof, its misuse of net revenue averages of prior years, its conclusive preferences for prophecy over fact, for the opinion of one valuation witness and for proof impossible to produce, have denied appellant the rudiments of the trial to which it is entitled under the due process and equal protection clauses of the Federal Constitution.

I.

Confiscation Has Been Conclusively Shown.[24]

A simpler rate case than this one could scarcely be imagined. That is because confiscation appears upon the Commission's findings and the undisputed evidence of operations involved in the enforcement of the Commission's order. The Court of Civil Appeals could have ignored appellant's contention that the Commis-

[24] Assignment 1 (R. 510, 1407).

sion had undervalued its property. That Court did not have to concern itself with resolving conflicts in the evidence showing the operations affected. It needed only to turn to the order itself to find that the Commission had found $885,000 as the present fair value of appellant's property (R. 25), 7 per cent of that amount reasonable for annual return (R. 25) and 3 per cent per annum proper for depreciation (R. 21). It might then have turned to the record and found that the Commission's rate base, as well as its other findings, fully reflected economic conditions existing at the time the 55 cent rate was to take effect, since the property appraisals before the Commission were at the very low prices prevailing in July and August, 1932 (R. 200A, 215). The hearing before the Commission had been on present replacement values with full consideration given to depression prices (R. 197). Reference to the record would then have disclosed undisputed evidence showing the company's revenues for 1932 and 1933 at the existing 75 cent rate (R. 85), as well as its revenues for those years with the domestic gas computed (R. 99)—not estimated—at the 55 cent rate. See defendant's exhibit 6 (R. 93). Then, to determine the net revenue for those years, the Court could have found that the operating expenses for the year 1932 were shown by undisputed proof (R. 69, 93), and that this figure contained no charge for accrual to the depreciation reserve (R. 74). Further reference to the record would have revealed that certain of appellant's operating expenses in 1933 had been omitted by appellees' accounting witness. To avoid the necessity of considering the propriety of these omissions, the Court

could have ignored the 1933 operating expenses as they actually were (R. 79, 93), and could have used the 1933 operating expenses as shown by appellees (R. 253). This figure contained no provision for depreciation or income tax (R. 253).

Then if this evidence—evidence undisputed by appellees, or given by their own witnesses—had been tabulated by the Court, it would have shown the following:

	Year Ended December 31, 1932	Year Ended December 31, 1933
Operating revenues, with domestic gas sales computed at the 55 cent rate (R. 93)	$161,637.65	$138,256.85
Operating expenses, before depreciation reserve accrual	$125,001.40 (R. 69, 74)	$ 93,298.46 (R. 253)
	$ 36,636.25	$ 44,958.39
Depreciation reserve accrual; 3 per cent of $885,000, as found reasonable by the Commission (R. 21)	26,550.00	26,550.00
Net return	$ 10,086.25	$ 18,408.39
Rate of return on $885,000	1-1/10 per cent	2-1/10 per cent

Nothing can be said by way of argument that will add anything to what these figures show.

II.

The Finding by the Court Below as to 1933 Net Return After Enforcement of the 55 Cent Rate Was Wholly Unsupported.[25]

The effect of the enforcement of the 55 cent rate for 1932 was ignored by the Court of Civil Appeals, but appellant's 1933 operations were considered sufficiently to produce a gross miscalculation of the rate of return during that year upon the $700,000 valuation figure used by the Court. The Court declared:

> "And calculations based on the $700,000 and the estimated difference in revenues between the 55c rate and the 75c rate, show a return of more than 7% for the year 1933" (R. 422).

The computation by which this result was reached is not revealed and there is no combination of figures appearing in the record for the year 1933 which will produce any such result. The $18,408.39 (*supra*, p. 34) net amount for return after provision for depreciation at the rate fixed by the Commission, *i. e.*, 3 per cent of $885,000, is obviously not 7 per cent, but only about 2-6/10 per cent, of $700,000.

The $700,000 used by the Court of Civil Appeals is an approximation of the appraisal estimate of appellees' witness Elrod, after Elrod had excluded the pipe line

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[25] Assignment 6 (R. 511, 1408).

to the Jennings Field (R. 302). See plaintiffs' exhibit 12, "Total Value, Depreciated * * * $698,047" (R. 330). Elrod testified that he used the sum of $829,559 as the base upon which to compute depreciation at the annual rate of 3 per cent. $25,000 is a close approximation of 3 per cent of that amount and is the figure used by the Court in its computation No. 4 on page 419 of the record. If $25,000 for depreciation is used in the calculation which the Court of Civil Appeals was attempting, the net return would be:

	Year Ended December 31, 1933
Operating revenues after enforcement of the 55 cent rate	$138,256.85 (R. 93)
Operating expenses, as shown by appellees	93,298.46 (253)
Net revenues before provision for depreciation or income tax	$ 44,958.39
Provision for depreciation as given by appellees' witness Elrod (R. 322-323, 330)	25,000.00
	$ 19,958.39 or about 2-8/10 per cent of $700,000[26]

[26]If the most favorable figures in the record be used to compute the return for 1932 (not mentioned by the Court) on the Court's valuation figure of $700,000 and using the $25,000 depreciation figure, the following results:

There are no lower figures in the record upon which to base such a computation. Thus, the only time the Court gave even passing consideration to the result of enforcing the 55 cent rate, the return was overstated by a margin which measures the difference between a return which is clearly confiscatory and the return which the Commission said appellant was entitled to receive.

The error was called to the Court's attention in appellant's motion for rehearing (R. 438), but was ignored.

III.

The State Court Refused to Pass Upon Appellant's Claim of Confiscation Arising from the Commission's Undervaluation of Its Property.[27]

At the hearing before the Commission appellant offered proof showing reproduction cost new less depreciation as of August 1, 1932, to be $1,252,438 including

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[26]—*Continued*—

	Year Ended December 31, 1932
Operating revenues after enforcement of the 55 cent rate	$161,637.65 (R. 93)
Operating expenses (undisputed by appellees)	125,001.40 (R. 93)
Net revenues before provision for depreciation	$ 36,636.25
Provision for depreciation as given by appellees' witness Elrod (R. 322-323, 330)	25,000.00
	$ 11,636.25 or about 1-7/10 per cent of $700,000.

[27]Assignment 3 (R. 510, 1408).

going value, $1,097,356 without going value (R. 200A). The City's witness Elrod appraised the property at $810,698, using prices prevailing July 31, 1932 (R. 208, 215). The City also offered proof showing the historical cost of fixed capital, as of July 31, 1932, to be $1,048,853.65 (R. 1374A).[28] Appellant moved the Commission to make separate findings as to each principal item of property (R. 235), but this motion was ignored and the present fair value of all appellant's property of every kind was stated in the round sum of $885,000 (R. 25). Appellant was thus left without any means of knowing how the valuation was arrived at and the only reasonable conclusion is that it was arrived at by accepting almost *in toto* the evidence of the City's witness Elrod and rejecting with equal completeness the testimony of appellant's witnesses. This conclusion is justified, not only by the small difference between Elrod's figure and the Commission's figure, but by the discussion of the appraisals in the Commission's opinion (R. 14-22).

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[28]This figure contained investment for property for use outside as well as inside Laredo. The $1,048,853.65 was a "spot" figure as of July 31, 1932, and was after deduction of $118,318.09 (R. 1374A) as net retirements in reconditioning the main trunk and Pescadito-Carolina-Texas transmission lines into Laredo (see second footnote, R. 1374A), without crediting the cost of the replacements installed in this reconditioning job. See plaintiffs' exhibit 4 "Recondition 6" and 8" lines Laredo Area . . . $87,709.47" (R. 237); see map R. 216B. The opening entry in the fixed capital records of the old Border Gas Company, $550,000 (R. 249-252, 787-788), was elimated by appellees' accountants—and appellant thinks it should have been—but $166,966.68 was substituted therefor (R. 250, 787-788), to which appellant takes exception, as the $166,966.68 was the opening figure in the depreciation base used and accepted in computing depreciation for federal income tax purposes, and included neither non-depreciable property, nor expenditures incurred and classified as intangible fixed capital.

In its amended answer appellant asserted that the fair value of its property exceeded $1,225,000 both in 1932 and in 1933 (R. 39), and that the rate fixed on the lower valuation by the Commission would result in confiscation of its property (R. 40-41).

At the trial appellant's 1932 reproduction less depreciation appraisal was $1,071,179 (R. 152) and its 1933 appraisal $1,097,318 (R. 175), both exclusive of going value. Including going value, appellant's 1932 appraisal was $1,191,179 (R. 152, 178, 191) and its 1933 appraisal $1,217,318 (R. 175, 178, 191). Historical cost, as shown by appellees, no proration of investment for service outside Laredo being made, was $1,153,232.98 as of December 31, 1932, and $1,151,993.65 as of December 31, 1933 (R. 237).[28] Elrod's appraisal, as of December 31, 1933, excluding the pipe line to the Jennings Field, and after final correction, was $698,047 (R. 299, 302, 330).

Appellant's proof was substantial. In view of the unreliability of the original company's early records (below, Note 29), the only practical way to obtain

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[28] Appellant offered no testimony of actual or historical cost. The early property records of the old Border Gas Company were found to be both inaccurate and incomplete (R. 14-15, 787-788). Appellant's accountant refused to support them (R. 99). This was not only on account of the unsupported opening entry (R. 787-788), but because charges that should have been made to capital were not made (R. 99). The unit for rate making purposes was the area within the corporate boundaries of Laredo (R. 9-26). That the entries to fixed capital could not be classified as between different types of service property, nor the investment in property for service solely within the Laredo city limits segregated from investment in property jointly used for service inside and outside those limits, is evidenced by the fact that the City's accountants did not attempt such a segregation (R. 237-238A).

proof of value in any degree accurate and conforming to the territorial unit involved was to prepare an inventory of the property solely or jointly used for the service, appraise that property by computing the cost of material and installation, deduct depreciation, and prorate the appraised cost of jointly used property items. This was the method followed, inventory differences being first reconciled (R. 297). See defendant's exhibit 9, 1932 (R. 151) and exhibit 12, 1933 (R. 174) and plaintiffs' exhibit 9, 1933 (R. 298) and exhibit 12, correction of plaintiffs' exhibit 9 (R. 329). See also property appraisals at the Commission hearing (R. 200A, 203).[30]

The substantial nature of appellant's evidence is accentuated by a comparison of the character of its proof with the testimony of the engineer witness as to value tendered by appellees. This one witness was used by the State and all the other appellees, including the Railroad Commissioners, and his testimony was not supported by any of the Commissioners, by any of the Commission's engineering staff, or in any other manner.

Appellant's 1932 and 1933 appraisals represented the judgment of Greene, appellant's chief engineer (R. 141). In the three and a half years before he testified, Greene had designed, prepared plans and specifications for, and supervised the construction of natural gas properties, gathering and transmission lines, and distribution systems, as well as compressor stations and gasoline plants, costing about $30,000,000 (R. 141-148). Appellant's appraisals also represented the judgment

[30]The record brought up to this Court shows only valuation summary sheets of the appraisals.

of Biddison. Biddison, either as engineer or in direct charge of construction, had to his credit the building of approximately 7000 to 8000 miles of natural gas transmission lines, and natural gas distribution systems serving in excess of 500,000 meters (R. 184).[31] These men were not professional or expert witnesses, but designers and supervisors of construction. Both of them had been entrusted with responsibilities such as are given only to men of sound, seasoned and experienced judgment.[32] The large amount of natural gas construction work over which Greene had supervision gave him an unexcelled opportunity to check the accuracy of his judgment in respect to natural gas construction costs. Before the first of each year, Greene made or supervised the making of separate, detailed estimates of the cost of each construction job proposed for the coming year. Upon the basis of Greene's estimate of costs, construction funds were provided (R. 142-144). Greene supervised the making of detailed designs, plans and specifications for each project, the preparation of bills of material and requisitions therefor, he provided direct engineering supervision on the construction sites, and was responsible for daily and weekly progress reports. Greene was also responsible for the final completion

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[31]Greene prepared appellant's appraisals (R. 149-155; 173-175) and Biddison checked and analyzed the underlying figures except those for minor property classifications appraised at very small sums (R. 185-189).

[32]Greene had testified only once before a commission (in the hearing of this case before the Railroad Commission), and never before in any court (R. 141). Biddison had testified in six cases, three before the Texas Commission, two in Alabama, and one before the Kansas Commission (R. 1224).

reports and construction cost analyses, which included a comparison of the costs of construction as estimated by Greene and as actually incurred (R. 144). Greene testified that upon the construction work he had handled beginning in 1930, his construction cost estimates had averaged within 2 to 3 per cent of the actual cost, although occasionally his estimate would be from 5 to 10 per cent in error (R. 180).

The two appraisals of the Laredo properties were prepared in practically the same way as Greene would make up an expenditure requisition for a construction job, the unit costs being those conforming to the conditions to be met in the Laredo area (R. 179). The inventory was treated as the bill of materials. Test holes were dug both to determine the types of underground equipment and to inspect for condition.[33] General construction costs were computed from analyses of these costs as actually encountered in Greene's experience. Where payrolls were involved in the computation of these costs, the wages being paid by appellant to men holding like positions were used (R. 166-171). See defendant's exhibit 10 (R. 159-166). Greene's costs of this type conformed to Biddison's experience (R. 189-190). The testimony on going value was an estimate, $120,000 (R. 178), set forth in a statement by Greene (R. 176-179), and supported by Biddison (R. 190-191). The going value estimate was based upon the well-established character of appellant's natural gas busi-

[33]Over 6000 test holes were dug on the distribution system alone, as this inventory was prepared from field work, not office records (R. 145-146). Transmission lines were inspected at test holes dug at each mile post (R. 148-149).

ness in Laredo, the favorable ratio of gas consumers to total population and to consumers of other forms of utility service in that City, and upon the efficiency of appellant's operations at Laredo. This state of business development at Laredo was compared with actual experience in building and developing a number of similar properties (R. 176-179).

On the other hand, the witness Elrod, whose testimony was apparently followed by the Commission and whose valuation was unhesitatingly accepted by the Court of Civil Appeals, had never had anything to do with the design, or construction, or operation of a natural gas property (R. 208, 296). He had not gone into the operation of appellant's properties serving natural gas in Laredo (R. 320). He had never bought any gas pipe or fittings (R. 296). At the Commission hearing, he did not know what kind of trucks were used on cross-country pipe line work (R. 1276). In his appraisal he used spot prices for materials, taking all quantity discounts, with the delivered cost of materials figured at carload freight rates, even for small fittings (R. 311-312). His costs of installation contemplated all economies to be obtained by modern machinery (R. 310-313). However, Elrod used only one-half the engineering and supervision expense which he admitted would be incurred in present reconstruction. Compare "Engineering & Supervision, 2-1/2%" (R. 207, 299, 330) with Elrod's testimony (R. 303, 305). His general construction costs were an arbitrary 10 per cent. That 10 per cent was arbitrarily divided between the usual general construction cost classifications of expense. But Elrod had made no analysis of the functions causing those

costs, or of similar costs incurred in gas construction work (R. 306).

Elrod could find no going value when before the Railroad Commission (R. 214). When before the Court he testified he had included going value (R. 302), but not separately (R. 303). Yet he could not say whether the amount he had included was as much as 50 cents (R. 325-326).

Elrod said he had given effect to inspection in his deductions to show cost new less depreciation (R. 309-310). He could not point to one instance where inspection has changed his deductions on a straight-line age-life basis (R. 309-310; 313-316). Starting with the known or assumed date when a pipe line was first laid between two points, Elrod's straight-line depreciation deductions proceeded inexorably at the same annual percentages. It never occurred to him that loss in value from depreciation was arrested by maintenance or reconditioning,[34] or overcome by replacements[35] (R. 307-310; 315-317).

Elrod included the pipe line to the Jennings Field in his 1932 appraisal (R. 316), but excluded it from his

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[34]The term "reconditioning" means that a line running through a "hot spot," or corrosive soil area, is stripped of its earth cover, lifted, joints badly pitted by corrosion culled out and replaced, the remaining joints sand-blasted, primed, coated and relaid (R. 315). As the name implies, "hot spots" are limited in size (R. 128, 1278). Hot spots occur at certain points within a hot spot area. For example, when the reconditioning was done on the Pescadito-Jennings line in 1933, the work covered some 40,000 feet of that line (R. 682), but total replacements consisted of 11,000 feet of pipe (R. 704).

[35]In making his first appraisal (R. 203-208), Elrod applied an arbitrary per cent condition to certain distribution mains, such as 45 per cent for black pipe, 72 per cent for painted pipe,

appraisal for 1933 (R. 298-300; 329-330). Elrod testified that the line was built to serve Laredo and was serving Laredo when he last saw it (R. 316). He admitted that the need for reconditioning this line was confined to that section between mile posts 27 and 30 (R. 316-318; see R. 360). So, never having operated a gas company (R. 296) and never having gone into the operations of this one (R. 320), Elrod put his exclusion of the line on his feelings in the matter and his judgment as an engineer (R. 302).

Appellant has done all that it can to get an independent judicial review on the question of value and cannot get it. Compare *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 293. The proof was not such that it could not conceivably establish the unreasonableness of the Commission's valuation. *Nashville, Chattanooga & St. Louis R'y v. Walters*, 294 U. S. 405, 415-416. The testimony was competent, and the refusal of the state courts to consider the proof amounts to a denial of a hearing on the issue. *Georgia Railway & Electric Co. v. Decatur*, 295 U. S. 165, 171.

The trial court permitted the introduction of sharply conflicting testimony as to property value, but refused to allow the conflicts to be resolved by findings of fact (R. 372-387). The Court of Civil Appeals relieved itself of the duty of examining the evidence with respect to value by treating the matter as presenting nothing

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[35]—*Continued*—
85 per cent for enameled and wrapped pipe. He used 67 per cent for transmission lines where sections had been reconditioned (R. 313, 316). But when he made his second appraisal as of December, 1933, he made further deductions for depreciation on a straight-line age-life basis (R. 313-316).

but a question of practice (R. 414). This despite the fact that the deprivation of constitutional rights occasioned thereby was specifically raised in each of the assignments summarily dismissed as involving mere matters of practice (R. 406-410), and was again called to the Court's attention in appellant's motion for rehearing (R. 440-441, 448-453).

Appellant has not only been denied an independent judicial review by the state courts on this basic issue, it has been denied any review whatever. This action is contrary to all the decisions of this Court. *St. Joseph Stock Yards Company v. United States,* 298 U. S. 38, 49-54.

No finding of fact was made by any of the courts below with respect to the fair value of appellant's properties. The Court of Civil Appeals did use the figure $700,000 in its computations, but its only finding with respect to this figure was not that $700,000 was fair but that it was the lowest appraisal in the record (R. 422). "The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and *have judicial findings based upon it.*" *Baltimore & Ohio R. Co. v. United States,* 298 U. S. 349, 368-369. The courts below having refused to review the evidence and to make judicial findings from it, the necessary result is that the State of Texas has failed to provide appellant that adequate judicial hearing as to confiscation required by the Federal Constitution. *Ohio Valley Water Company v. Ben Avon Borough,* 253 U. S. 287, 289.

The error was harmful, although the hurt is simply a

matter of degree. The 55 cent rate is so flagrantly unjust that confiscation has been demonstrated from this record upon the Commission's own findings by evidence undisputed and indisputable by appellees. Despite the fact that appellant's showing of confiscation is not dependent upon the claim that the Commission's valuation was inadequate, it is respectfully submitted that the error is of such nature that this Court should correct it. This is all the more important because, under the Johnson Act [Subd. (1), sec. 41, Title 28, U. S. C., as amended May 14, 1934], confiscation cases now will ordinarily first be tried out in the courts of the States. Unless these courts are required by this Court to accept and follow the standards of procedure heretofore established, this Court will be without a record appropriate for determining the rights of the parties in rate cases, and those rights will be gravely impaired.

IV.

The Retroactive Refund Provision of The Commission's Order Was Upheld Without Finding the Facts Essential to Determine the Effect Upon Appellant's Constitutional Rights.[35]

It will be recalled that the trial court held the retroactive refund provision of the order invalid and that its judgment enforced the order only from April 24, 1934 (R. 389-391); recovery of refunds from January 1, 1932, being denied. Appellees appealed from this part of the judgment. In respect to this cross appeal, the Court of

[35] Assignment 11 (R. 512, 1410).

Civil Appeals held, as a matter of abstract law, that the state statute (Art. 6058, Appendix p. 82) was to be construed so as to give the Railroad Commission power to make the 55 cent rate effective by refunds from the date of the 40 cent rate ordinance.[37] Having determined the abstract *existence* of the power, the Court, without the slightest consideration of the effect of the *exercise* of such power, proceeded to reform the judgment below as to require refunds to be made on all collections subsequent to January 1, 1932. No finding was made with respect to the fair value of appellant's property at any time, much less a finding as to each of the years involved. *Smith v. Illinois Bell Tel. Co.*, 282 U. S. 133, 162. See also *Columbus Gas & Fuel Co. v. Columbus*, 55 Fed. (2d) 56, 57, and compare *Lindheimer v. Illinois Bell Tel. Co.*, 292 U. S. 151, and the findings in the lower court, 3 F. Supp. 595, 596-600. As to the effect of the 55 cent rate, the Court's finding with respect to 1933 was in direct conflict with all the evidence, and no finding was made with respect to 1932.[38]

Not only did the Court enter its judgment without the necessary findings, but entered it in direct conflict with the undisputed proof so far as 1932 and 1933 were con-

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[37]This was the ordinance effective January 1, 1932, from which appellant first appealed to the Commission, and which was suspended and finally set aside as unreasonable by the Commission (R. 427).

[38]The undisputed proof showed that if the refunds were made, appellant would be deprived of just compensation for the use of its property for 1932 and 1933, even if the Commission's own findings be ignored, and the most favorable figures in the record used. These figures show that after making the refunds, appellant would be left with a return of 1-7/10 per cent in 1932 and of 2-8/10 per cent in 1933. See tabulations in II, *supra*, pp. 36-37.

cerned and without any proof at all with respect to the period intervening between the trial (March, 1934) and October 30, 1935, the date of the appellate court's judgment (R. 389, 428). Compare *Central Kentucky Co. v. Commission*, 290 U. S. 264, 273-275.

Before a public service company may be constitutionally required to give up its prior collections, it must appear that after so doing there will remain, with respect to the period involved, sufficient sums to constitute just compensation for the use of the property which rendered the service. *Baltimore & Ohio R. Co. v. United States*, 298 U. S. 349, 373. The essentials of a fair hearing are denied when there is a refusal to consider the effect on past years of making lower rates apply through refund of portions of the receipts for service in those years. *West Ohio Gas Co. v. Commission* (No. 2), 294 U. S. 79, 81-82.

If the judgment of the Court of Civil Appeals stands, appellant is without remedy under the state law. The Railroad Commission loses jurisdiction of the subject matter of its order while the validity of that order is in litigation, and the Commission is not empowered to relieve from the effect of its order as to past transactions. The only way the Commission's action can be undone is to set the order aside.[39]

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[39] While the validity of its order is in litigation, the Railroad Commission loses jurisdiction over the subject-matter of the order. *Stewart v. Smith*, 126 Tex. 292, 295. See also the following decisions (none officially reported): *Edgar v. Stanolind Oil & Gas Co.*, 90 S. W. (2d) 656, 657; *Barnsdall Oil Co. v. Railroad Commission*, 90 S. W. (2d) 663, 664; *Railroad Commission v. North Texas Coach Co.*, 92 S. W. (2d) 268, 270; *Stanolind Oil & Gas Co. v. Railroad Commission*, 92 S. W. (2d) 1057, 1059; *McNeny v. Railroad Commission*, 96 S. W. (2d) 96, 99; *Smith v.*

V.

The Holding That The Evidence Was Insufficient As A Matter of Law to Show Confiscation—In So Far As the Holding Was Upon Evidence—Was Based Upon Consideration of Only Certain Testimony Offered By Appellees.[40]

The Court of Civil Appeals held that, as a matter of law, "the evidence of appellant did not show • • • that the lower 55c rate" would result in confiscation. This statement concludes the paragraph on page 425 of the record in which the Court purports to discuss the evidence with respect to confiscation. The only other portion of the opinion in which the Court discusses such evidence is the paragraph beginning on page 422 of the record. Neither of these paragraphs contain the remotest reference to appellant's evidence nor does the opinion at any place give consideration to the affirmative and undisputed proof that the 55 cent rate was confiscatory in its actual operation. Instead the Court took only two portions of appellees' evidence to reach the conclusion that *appellant's wholly unconsidered evidence*

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[39]—*Continued*—
Wald Transfer & Storage Co., 97 S. W. (2d) 991, 996. This on the theory that the Commission and a court cannot have concurrent jurisdiction over the same subject-matter. The Commission is without power to relieve from the effect of its order in respect to past transactions, but can only extend relief prospectively. *Houston Chamber of Commerce v. Railroad Commission* (not officially reported), 19 S. W. (2d) 583, 588, affirmed on other grounds, 124 Tex. 375. When an order of the Railroad Commission is set aside by a court, the controversy goes back to the Commission to make a new order. *Railroad Commission v. Uvalde Construction Co.* (not officially reported), 49 S. W. (2d) 1113, 1114.

[40]Assignment 5 (R. 511, 1408).

failed, as a matter of law, to show confiscation. One of these two portions of appellees' evidence was with respect to the average annual revenues at the 75 cent rate for the four year period used by the Commission and for the five year period covered by appellees' testimony at the trial. The second portion of appellees' evidence was Elrod's appraisal of about $700,000, characterized by the Court as the "lowest valuation shown by the evidence" (R. 425). With this $700,000 figure as the basis, the Court then made certain calculations purporting to show that large returns had been made at the 75 cent rate in prior years.

Testing the legal sufficiency of appellant's evidence as to confiscation, not by a consideration of *that* evidence but only by use of certain of *appellees'* evidence, was justified by the Court of Civil Appeals through its application of a formula constructed out of certain words used in four decisions of the Federal Courts.

Turning to the paragraph of the opinion beginning on page 421 of the record, the statement is found that "The rule is settled that rates are not based upon the results of business of any one year alone, * * *." That sentence, and the next sentence ending "a test of five years or more next preceding the inquiry, if available, is selected" (R. 421), are taken from *Denver Union Stock Yard Co. v. United States*, 57 F. (2d) 735, 752-753. The next sentence is from *St. Joseph Stock Yards Co. v. United States*, 11 F. Supp. 322, 325, last paragraph under syllabus 4. The words "resolve all doubts against the complaining party; pare down valuations unsparingly" (R. 421) are from the opinion of this Court in *Newton v. Consolidated Gas Co.*, 258 U.

S. 165, 174, quoting from the opinion of Judge Learned Hand, 267 Fed. 231, last paragraph page 261 and last paragraph page 269. The next sentence (R. 421-422), in which the Court of Civil Appeals points out that the due process and equal protection clauses of the Federal Constitution do not assure the utility the right to a return on its property under all conditions and circumstances, is from *Public Service Commission v. Great Northern Utilities Co.*, 289 U. S. 130, 135; and in the final sentence (R. 422), the Court returns to the opinion of the lower court in the *St. Joseph Stock Yards case*, 11 F. Supp. at page 325.

From these selected passages the Court of Civil Appeals concluded that the only "real criterion or guide" by which a rate can be shown confiscatory is to test that rate, and that since a five year period is often used by rate making bodies to *forecast* a new rate, a test for five years, or at least for a period of years long enough to determine matters of doubt and uncertainty, is required to *demonstrate confiscation* (R. 421). The Court then concludes that if a utility refuses to accept the lower rate, it is the duty of the Court to decide confiscation by paring down valuations unsparingly and resolving all doubts against the complaining party.

As the Court applied the formula in this case, it means that a public utility must for several years, probably five, give up its constitutional rights before it is entitled to protect them. Certainly more than two years undisputed confiscation on the Commission's own findings must be shown, since such confiscation for that period was shown in this record and rejected by the Court as insufficient. If it be urged that this proof was inconclu-

sive because resulting from the mathematical application of the 55 cent rate to the sales of the company at a time when the 75 cent rate was actually being charged, the answer is that any other kind of proof was impossible under the circumstances of this case. The 40 cent rate fixed by the city council was suspended by the appeal to the Railroad Commission and was found by the Commission to be unreasonable and the 55 cent rate substituted. From January 1, 1932 (the effective date of the order), until June 13, 1933 (the date of entry of the order), the 55 cent rate was not in existence to be put to a test. After the Commission's order was entered, appellees filed this suit to enforce the order and themselves caused the order to be suspended by the state court (R. 7, 26). Thus at all times, except during the short period between the date of the Commission's order and the date of filing of this suit, there had either been no 55 cent rate, or that rate had been suspended by appellees' own action. To require proof impossible of production as a condition to the judicial protection of property rights is not due process. Compare *International Harvester Co. v. Kentucky*, 234 U. S. 216, 223.

The gravity of the Court's error, however, is not fully appreciated without considering how the Court "pared down values unsparingly" and "resolved all doubts against the complaining party."[41] The former was accomplished by the simple expedient of accepting the

[41] This discussion is intended to show the cumulative effect of the error. The particular applications of the formula in respect to property value (VI, *infra*, pp. 55-59) revenues (VII, *infra*, pp. 60-64), and the requirement of proof based on a test of the 55 cent rate (VIII, *infra*, pp. 64-74) are considered separately in the next succeeding sections.

lowest over-all appraisal found in the record and the latter by not permitting appellant's evidence to raise any doubts to be resolved. Thus "paring down values unsparingly" meant unquestioning acceptance of the lowest testimony as to over-all value offered by those seeking to enforce the rate in question, without any analysis of the data supporting the over-all figure, and without reference to any conflicting testimony, no matter how cogent. "Resolving all doubts against the complaining party" meant, not the resolution of a doubt engendered in the mind of the Court after weighing the evidence, but refusal even to consider the evidence relied on by appellant and complete acceptance of such of appellees' testimony as gave the outward appearance of supporting the order. The Court of Civil Appeals has thereby made itself one not merely "bound by the findings of the implicated board for which there is any evidence, always easily produced," but one bound by any testimony offered on behalf of the members of such board as plaintiffs in a law suit, even though the testimony was in direct conflict with the basic legislative findings of those officials.[42] The hearing accorded appellant in a court so bound does not meet the fundamental requirements of due process. *Chicago, Burlington & Quincy R. R. v. Osborne,* 265 U. S. 14, 16-17.

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[42]If the Court of Civil Appeals had made a proper examination of the record, it would have discovered that even after paring down the value of appellant's property unsparingly to $700,000 and after resolving all doubts against appellant by using the lowest depreciation reserve figure in the record, the 55 cent rate would have produced a return of only 1-7/10 per cent for appellant's gas service rendered in 1932, and of only 2-8/10 per cent for such service rendered during 1933. See tabulations, II, *supra,* pp. 36-37.

VI.

The Lowest Appraisal Estimate To Be Found In The Record Was Used As The Basis For Such Calculations of Return As Were Made In The State Appellate Court.[43]

To support its conclusion that the evidence, as a matter of law, failed to show confiscation, the Court of Civil Appeals calculated return on the basis of $700,000, which was an approximation of the 1933 appraisal by Elrod (R. 330). The Court's selection of this figure was through the purely mechanical process of scanning the record for the lowest over-all figure given at the trial by any witness on property value, without even a passing reference to the qualifications of that witness or to the strength or weakness of the reasoning by which he supported his opinion.[44] Thus the 55 cent rate was held non-confiscatory on a property value which was $185,000, or more than 20 per cent, lower than the Commission's legislative finding of value on which the rate was based. The result was to deny determination of appellant's claim that, because $885,000 was wholly inadequate, the 55 cent rate was confiscatory to an even greater degree than appeared when the Commission's valuation was used. This was fundamental error (*St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 49-54), and even more "rough and ready" than that condemned in *West v. Chesapeake & Potomac Tel. Co.*, 295 U. S. 662, 679. In the case last named the District Court at least reached its conclusion as to value after it had considered, an-

[43] Assignment 9 (R. 512, 1409).

[44] See analysis of Elrod's testimony, III, *supra*, pp. 43-45.

alyzed and passed upon *all* the evidence on that issue. 7 F. Supp. 214, 218-234. In this case the Court of Civil Appeals simply used "the lowest valuation shown by the evidence (about $700,000)" (R. 425), a procedure which required it to do nothing more than make a comparison of the over-all totals given by the valuation witnesses, and to exercise its judgment only to the extent of selecting the lowest figure.

It will not do to say that the Court of Civil Appeals used $700,000 because the Commission's valuation included the pipeline to the Jennings field. The Court announced as the rule for determining the constitutional question of confiscation where raised in respect to a new untried rate that "the court on appeal must * * * pare down valuations unsparingly" (R. 421). It repeated that rule on page 422 and again on page 425 of the record, and each time the paring was down to $700,000, as the lowest valuation shown by the evidence. The Court characterized the $885,000 valuation as extremely liberal,[45] because it included the Jennings line (R. 422), but that was a mere surmise. The Commission refused to reveal how its $885,000 valuation was made (R. 235),

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[45]Obviously, a total sum consisting of a number of sub-totals cannot be characterized, unless each sub-total is known. The statements in the opinion that $885,000 included two pipe lines "at a valuation of more than $135,000" (R. 422), and that the Jennings line was included at $124,688 and the West Jennings gathering system at $10,342 (R. 414, 419) are based on sources of information outside this record. The probable explanation is the opinion of the Commission, where it is stated that the City's engineer Elrod included these two pieces of property in his appraisal at depreciated costs of $124,668 (R. 16) and $10,342 (R. 15). But neither in their opinion (R. 25) nor in the testimony did the Commissioners reveal *what part* of the $885,000 represented the Jennings line or gathering system.

and gave no testimony which would permit a judicial *finding* of the amount at which any particular piece of property went into the $885,000 lump sum.

The Court of Civil Appeals ignored the distinction between legislative and judicial functions in respect to property valuation for rate purposes. The Railroad Commission's valuation was either made without error of law resulting in confiscation, or it was not. If the former, the Court of Civil Appeals should have struck down the order and left it to the Commission to make a new order, including a new valuation. The opinion contains an emphatic declaration that the Court could only act in a judicial capacity, and could not "exercise the legislative function of rate-making" (R. 424). But in spite of that declaration, the Court consistently ignored the Commission's legislative finding of value, and used $700,000 as the basis of every calculation of return which it made in deciding the case (R. 425).

This action speaks for itself. In *Los Angeles Gas Corp. v. Commission*, 289 U. S. 287, *Dayton Power & Light Co. v. Commission*, 292 U. S. 290, and *West Ohio Gas Co. v. Commission* (*No.* 1) *and* (*No.* 2), 294 U. S. 63 and 79, confiscation was determined upon fair value as found by the rate-making body.[46] The attempt of a District Court to construct a new rate base was condemned, *West v. Chesapeake & Potomac Tel. Co.*, *supra*, pp. 675, 679, as was a like attempt to fix judicially a

[46] It will be remembered that in the *West Ohio cases*, the Commission valuations were at predepression levels, and that in the *Dayton case*, there was found to be a substantial excess in the base for the questioned rates on account of the Commission's valuation of gas leases.

new tax base, *Rowley v. Chicago & Northwestern R'y*, 293 U. S. 102, 111-112.

Furthermore, when rate making officials fix fair value, base a rate on that value, bring suit almost immediately to enforce that rate, expressly declaring in that suit upon the rate order of which the fair value finding is a part, such officials ought to be bound by the value they have fixed and declared upon. To assert otherwise is to say that the appellees may procure the undoing in judicial chambers of what they had very recently done in the Commission hearing room. In *St. Joseph Stock Yards Co. v. United States*, 58 F. (2d) 290, 297-298, three judges held the Secretary of Agriculture bound by his valuation, saying:

> "This conclusion indeed assumes that the valuation found by the Secretary is still a fair valuation of petitioner's property. But it is proper that that assumption be made. The rates for services ordered by the Secretary are predicated upon that assumption. Without it the order is invalid as having no foundation. * * * The valuation fixed is the only valuation in the case, and it cannot be questioned and at the same time affirmed."

If the decision below is upheld, judicial intervention to prevent confiscation is at an end in Texas. In any suit of this kind, a witness can usually be found to express the opinion that even the Commission's valuation is substantially in excess of the real worth of the utility's property. This type of opinion testimony has been characterized as "always easily produced," *Chicago, Burlington & Quincy R. R. Co. v. Osborne*, 265 U. S. 16-17, yet, under the law of Texas as established in the decision below, such testimony is binding on the court.

This despite the fact that this Court has held such testimony not to be binding and, at times, not even persuasive. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 18; *Dayton Power & Light Co. v. Commission*, 292 U. S. 299. Under the Texas rule, as applied below, only in the event of complete default by the state officials could the order be set aside. Appellees' sole witness as to valuation was a consulting engineer, with no official connections, employed to make an appraisal and testify in this case (R. 297). The Court of Civil Appeals adopted the estimate of this engineer, and in so doing made his opinion conclusive, not only against the Commission's legislative finding of present fair value, but against all other valuation testimony of every kind offered at the trial.[47] So conclusive, indeed, was the opinion expressed by this one witness that the Court of Civil Appeals held it would have been improper to have asked the jury to resolve the conflict between his opinion, the opinion of appellant's experienced witnesses, and the finding made by the Commission itself (R. 414, 424). This cannot be due process.

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[47]To make the testimony of one witness conclusive and indisputable is so entirely foreign to our system that Wigmore summarily dismisses the possibility of its occurrence, remarking that such action on the part of a court would be a refusal to exercise the judicial function and that no one ever thought of suggesting a rule of conclusive preference for any testimony except certain written governmental records. *Wigmore on Evidence*, 2nd ed., sec. 1348; *Wigmore Code of Evidence*, 2nd ed., Rule 146, par. (b), sec. 1304.

VII.

Controlling Weight Was Given To Revenues of Four Prior Years At The 75 Cent Rate In Deciding That The Evidence Was Insufficient to Show That The 55 Cent Rate Was Confiscatory.[48]

The second part of appellees' testimony used by the Court in deciding appellant's evidence legally insufficient to raise even an issue of confiscation related to the company's alleged average revenues for certain years and these average revenue figures were given controlling effect against appellant's undisputed and unconsidered evidence with respect to the actual effect of the order for the two full years prior to the time of the trial. The argument of the court was that since "it was shown that under the existing rate appellant has received an average annual return, even through several depression years, of about 11 per cent on the value of its property used in the public service," the evidence of appellant manifestly "did not show, as a matter of law, that the lower 55c rate" would be confiscatory (R. 425). Not only was the use of any average revenue figures wholly unwarranted under the circumstances of this case, but the use actually made of them by the Court is without parallel in the decisions.

It is not disputed that average revenues are useful where *prediction* is necessary. In this case the event which was the subject of the prediction had occurred and the data which formed the basis for the prediction had lost their relevancy. The action of the Court below in using these averages was "to prefer the forecast

[48]Assignment 7 (R. 511, 1408).

to the survey" and "is an arbitrary judgment," such as was condemned in *West Ohio Gas Co. v. Commission (No. 2)*, *supra*, page 82.

The character of the averages used and the use made of them throws into bold relief the harmfulness of the error and the controlling effect it had upon the decision. The particular calculations used by the Court as a basis for its ultimate holding appear on page 425 of the record but refer back to the tabulation appearing on pages 418 and 419. This tabulation purports to show net amounts available for return, at existing rates and before provision for depreciation, for five selected twelve month periods (R. 418) and four different combinations of these twelve month periods (R. 419). First it may be noted that the table on page 418 shows large deductions for "questioned items of operating expenses," which of course by the same amounts increased the sum shown as available for return. These deductions were made without competent supporting evidence.[49] Next it is to be observed that the calendar year 1932 (the first

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[49]These items were listed in a table at the back of plaintiffs' exhibit 8 prepared by their accountant witness Lewis (R. 253 *et seq.*). This exhibit was admitted over appellant's objection (R. 252). The major part of these expenses were those as to which Lewis had only examined vouchers, and which he had not attempted to verify from the accounts of original entry (R. 219-224). The remainder, such as uncollectible accounts (R. 221) he thought were items subject to "some controversy in a rate controversy" (R. 272). He testified that there was no doubt that the amounts were actually paid by appellant (R. 221) and when he was recalled by appellees to testify as to the "net return before provision for depreciation and income tax" for the four fiscal years and 1933 (plaintiffs' exhibit 8, R. 253) after deducting non-recurring power plant and refinery revenues and gas purchase expense, he included them in his figures (R. 291, 881-882).

year to which the order applied) is entirely omitted although the fiscal year ending July 31, 1932, is included. It may then be noted that the last two twelve months periods shown on the table on page 418 include one year and seven months of the period during which the Court below has said that refunds of the difference between the 75 cent rate and the 55 cent rate must be made, yet the revenues shown as available for return are *at the 75 cent rate.* The averages used are unweighted, mathematical averages. Finally, and most extraordinary of all, the calculations purporting to show the average annual rate of return on page 419 assume that appellant's property had the same value throughout a period of time covering two entirely different economic eras.[50] This in the teeth of an express declaration by the Commission that the testimony upon which it found the $885,000 valuation was at depression prices (R. 197).

From this wholly misleading and erroneous tabulation (R. 419), the Court of Civil Appeals selected the average revenue calculations of two periods as conclusive proof that appellant's property was not being confiscated in 1932 and 1933 (R. 425). The Court first declared "that the average net revenue for the five year period used in the trial court, less annual depreciation of 3% on the $885,000 valuation of appellant's property, would yield an average anual return of 8.46%." In this calculation the product of the 75 cent rate during the four fiscal years had a weight of four, the product of the 75 cent rate in the calendar year 1933 a weight of one. Bearing in mind that the calendar year 1933

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[50] *Atchison, Topeka & Santa Fe Ry. Co. v. United States,* 284 U. S. 248, 261.

was the second full year to which the order applied, this calculation is the equivalent of saying that what you earned for four prior fiscal years is proof of your 1933 earnings four times as cogent as proof of what they actually were. In addition, the calculated average included large amounts of revenue which the Court has said appellant could not keep, but must return to its customers. Not satisfied with this, the Court then applied the calculated revenue average to its lowest appraisal figure of $700,000, and found appellant to have received an average annual return for the five year period of more than 10 per cent.

The second calculation of the Court was "that if the average net revenues for the four year period used in the hearing before the Commission are utilized, such revenues, less 3% on the $885,000 valuation of appellant's property, would yield an average annual return of 9.47%" (R. 425). The Court then, as in the first calculation, used the $700,000 lowest appraisal and found an average return of more than 11 per cent during this four year period. This calculation gave the product of the 75 cent rate during the four fiscal years a weight of infinity. Bearing in mind that the issue as to confiscation was with respect to returns in 1932 and thereafter, the use of this average to decide that issue was equivalent to saying that what your return was in four prior fiscal years is conclusive proof of what your return was in the calendar years 1932 and 1933, and proof of what your actual return was for those years is no proof at all.

Immediately following the second computation the Court says:

> "Thus it was shown that under the existing rate appellant had received an average annual return, even through several depression years, of about 11% on the value of its property used in the public service" (R. 425).

Then, after suggesting that the appellant might receive greater returns under the new rate because of a possible increase in business, the Court immediately concluded that appellant's evidence, as a matter of law, failed to show confiscation. Thus the Court, having first fallen into the error of considering averages at all, was led into the further error of using the revenues received from July 1, 1928, to impose confiscation commencing with the calendar year 1932. This second error was as fatal as the first. *Board of Commissioners v. New York Telephone Co.*, 271 U. S. 23, 31-32; *Newton v. Consolidated Gas Co.*, 258 U. S. 165, 175.

VIII.

Because The New Retroactively Effective Rate Had Not Been Put To An Actual Test, Appellant's Evidence Was Held, As A Matter of Law, Insufficient To Show Confiscation.[51]

While the notion of the Court of Civil Appeals with respect to appellant's "failure" to test the 55 cent rate has been considered briefly, that matter was referred to so often in the opinion that a more extended discussion is deemed to be proper.

In response to the full evidence in the record with respect to appellant's operations and the effect of the

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[51] Assignment 10 (R. 512, 1409).

55 cent rate during the calendar years 1932 and 1933 (the first two years to which the order applied), which evidence clearly showed confiscation of appellant's property during both of those years, the lower court said:

> "An actual test of the lower rate might have resulted in a larger return, by bringing about an increase in appellant's business, and manifestly this Court would not be warranted in holding that the lower rate was either confiscatory, or unjust and unreasonable, as a matter of law, in advance of an actual test of the rate * * *" (R. 422).

Thus undisputed proof of confiscation during the calendar years 1932 and 1933 was completely rejected because appellant had not charged rates which *had no existence during three-fourths of the period in question.*

The so-called "test" cases cited by the Court (R. 422) are clearly inapplicable but since certain language from *St. Joseph Stock Yards Co. v. United States*, 11 F. Supp. 322, affirmed 298 U. S. 38, had a prominent part in the decision below, a short analysis of that case seems fitting.[52] The case involved an order of the Secretary of Agriculture entered in May, 1934, after a hearing concluded in February, 1933 (No. 497, R. 26), fixing rates *prospectively* from June, 1934 (No. 497, R. 6). The stockyards company had had two previous hearings before the Secretary (11 F. Supp. 324), and one by a court of three Federal judges [11 F. Supp. 324, 58 F.

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[52]The record in the *St. Joseph Stock Yards Case* in this Court was No. 497, October Term, 1935, and will be referred to as (No. 497, R. ___).

(2d) 290]. The Secretary's proposed rate schedule and detailed findings (298 U. S. 46; No. 497, R. 24-131) were given to the stock yards company in January, 1934, and the suit was brought in May, 1934, after the Secretary had heard and overruled exceptions and denied a motion to reopen. While the decree was not entered until May, 1935, the stock yards company made no proof of its experience for 1933 and 1934, though it had ample opportunity to do so (298 U. S. 48). It relied on the effect of certain Federal statutes and an *estimate,* not proof, of 1933 earnings (11 F. Supp. 324-325). The effect of the statutes was held speculative and the margin between the *estimate* of 1933 earnings and a reasonable return too small to show confiscation (11 F. Supp. 325). The three judges carefully reviewed every contention made by the stock yards company (11 F. Supp. 328-338; No. 497, R. 910-938), and in spite of the several previous hearings, they exercised independent judicial judgment and made findings of their own or adopted the Secretary's finding after careful analysis of the proof (298 U. S. 54).

The holding that the stock yards company ought to test the Secretary's rates was predicated upon the existence of a number of facts wholly absent here—the company had had three prior hearings; the company had failed to make proof of its actual operations during the two years intervening between the closing of the record before the Secretary and the decree; even on the company's *estimate* of 1933 earnings the margin of alleged confiscation was narrow; the rates fixed were prospective, and speedy and adequate remedies were

open to the company in the event the Secretary's predictions were wrong.[53]

In addition to these differentiating factors, the Secretary had made complete and detailed findings (No. 497, R. 24-131). In this case, the Commission did little more than discuss the matters as to which the testimony was conflicting, make a lump sum finding of fair value (R. 25), a general finding for depreciation reserve accrual (R. 21), substituted for certain expenses what was called "reasonable compensation" without saying what such reasonable compensation was (R. 24), and made no finding that the existing 75 cent rate was unjust or unreasonable (R. 9-26). Compare *Wichita Railroad & Light Co. v. Commission,* 260 U. S. 48, 58-59; *Mahler v. Eby,* 264 U. S. 32, 44-45; *Pacific States Co. v. White,* 296 U. S. 176, 186. The Secretary's rate base was at normal values, carefully avoiding depression prices, and as a basis for his prediction, he examined a six year prior period and derived rate factors from this study, not from mathematical averages. (298 U. S. 48, 71). The Commission here fixed its valuation at depression prices (R. 197), and adopted a straight mathematical average of four prior fiscal years as a basis for its prediction as to future earnings (R. 22). In the *Stock Yards Co. Case,* there were no peculiar conditions affecting the company's revenues different from conditions affecting business generally. In the present case appellant, about the time the 55 cent rate was made effective, had permanently lost revenues from

[53]See U. S. C., Title 7, Sec. 207(e), providing that any rate schedule filed shall not be suspended more than sixty days. See also Sec. 217 of the same Title and Sections 46 and 47 of Title 28 providing for injunctive relief.

two sources which had been averaging approximately $58,000 a year (R. 88C), which revenues, while they were not the product of the domestic rate, were credited by the Commission in determining appellant's over-all rate of return.

Under these circumstances the rulings in the *St. Joseph Stock Yards Case* can plainly have no application. On the other hand, this record requires the application of the rule that when existing rates are confiscatory, there can be no occasion for testing lower rates. *Northern Pacific Ry. Co. v. Department of Public Works,* 268 U. S. 39, 45. And it may here be noted that appellant has not followed a course of conduct which casts doubt upon its contentions. Compare *Lindheimer v. Illinois Bell Tel. Co.,* 292 U. S. 151, 160-164; *Dayton Power & Light Co. v. Commission,* 292 U. S. 290, 311, 312. Prior to January 1, 1932 (the effective date of the order), appellant petitioned the City of Laredo for an increase in the 75 cent rate, which it claimed to be confiscatory, and promptly appealed from the refusal to grant the increase (R. 10, 11, 26). Using the Commission's valuation and depreciation reserve accrual and taking only undisputed evidence or that most favorable to the order, the 75 cent rate yielded only 3-6/10 per cent return in 1932 (R. 94A) and 4-4/10 per cent in 1933.[54] Such a return is clearly confiscatory

[54]

1933	
At the 75 cent rate.	
Net revenues before depreciation or income tax, plaintiff's exhibit 8 (R. 253)	$65,524.16
3 per cent of $885,000 for depreciation reserve	26,550.00
Net return	$38,974.16
	or 4-4/10 per cent of $885,000

of a property situated as appellant's is, and which the Commission has said is entitled to a net return of 7 per cent.

The remarks of the Court below with respect to a possible greater return under the lowered rate because of an increase in appellant's business is but another example of the Court's failure to follow the rules announced by this Court (R. 422, 425). This sort of "guess work" has recently been condemned by this Court [*West Ohio Gas Co. v. Commission* (*No.* 2), 294 U. S. 79, 82, 83] and appellees made no effort to follow the method of proof of such matters suggested in that case.[55]

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[55]See testimony of Walker (R. 948), Hausman (R. 962, 968), Scales (R. 971-972), and Irwin (R. 975). None of these citizens had any experience in the natural gas business, nor had they made any survey or special study of the question. Fowler, consulting engineer, had experience in the construction of natural gas properties but simply expressed a general opinion (R. 1089, 1093). Montgomery, a teacher of economics at the University of Texas, had made no special study of the natural gas business, and had never been in Laredo except in passing through on his way to somewhere else (R. 1045-1046, 1048). He testified that, in his opinion, a lower price for gas would increase its use and that the same thing would be true of "any economic good" (R. 1050-1051). Martin, Mayor and former alderman of Laredo (R. 331), expressed the opinion that a lower price for gas in Laredo would increase use by existing customers (R. 332). However, this witness also testified that in his opinion the gas bills of existing customers would be about 20 per cent less under the 55 cent rate than under the 75 cent rate. As 20 per cent was approximately the margin of difference between the two rates, Martin's opinions were contradictory (R. 334-335). Martin also thought that appellant would gain from 1200 to 1500 new gas consumers, if it charged the 55 cent rate (R. 332, 336). The population of Laredo is about 70 to 80 per cent Mexican extraction (R. 978). This population has a lower standard of living than the average citizen of Anglo-Saxon descent (R. 953). On cross examination Martin estimated that about 700 of the additional customers would be obtained in a section of Laredo where the population was largely

The guesses of appellees' witnesses were met with proof of appellant's service to the territory for almost a quarter of a century (R. 11-12), and by proof that, despite the mild climate, appellant's service was more widely used than that of any other utility in Laredo.[56] Appellant also proved, through witnesses experienced in the gas business, that a reduction of the rate to 55 cents would not appreciably increase the use of gas.[57] The

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[55]—*Continued*—
Mexican, where there were 25 to 30 houses to the 330 foot block, which Martin described as the area between Arroyo Zacate and Santa Maria Avenues and between Bruni Street and the Tex-Mex Railroad tracks, and that the remainder would come from another similar area known as Colone Hidalgo, with some from the area west of Santa Eduardo Avenue and south of Iturbide Street (R. 336-337). Martin testified that the inhabitants of this area, at the 55 cent rate, would use gas for a small space heater and cooking appliance, each costing from $3.50 to $4.50, and would have one or two gas jets for light (R. 337-338).

[56]In the past twenty years practically every residence in Laredo had been built and equipped for the use of no fuel except natural gas (R. 123). There were approximately 10 electric cooking ranges, one electric water heater, very few electric space heaters and about 3 commercial installations using fuel other than gas in Laredo (R. 123-124). The following figures show the comparative use made of the respective utility services in Laredo (R. 424):

CUSTOMERS

	Gas	Electric	Water	Telephone
As of Jan. 1, 1933	4790	3162	4361	2742
As of Jan. 1, 1934	4775	3087	4227	2769
Increase or Decrease	15 decrease	75 decrease	134 decrease	37 increase
Percentage of increase or decrease	1/3 of 1 Per cent decrease	Over 2 per cent decrease	About 3 per cent decrease	About 1-1/2 per cent increase

[57]See testimony of Stein, appellant's district manager at Laredo, who had lived in Laredo and engaged in the natural gas

testimony of these witnesses was supported by proof of the result of reduction in natural gas rates in other cities similarly situated.[56]

Even if appellees' evidence as to an increase in business because of reduced rates had been definite instead of conjectural, there was still no measure of the supposed increase in gross revenues and there was a fatal omission to give any consideration whatever to the additional cost of serving more consumers. *Chicago, Milwaukee, etc., R'y v. Tompkins,* 176 U. S. 167, 179. See also *Rowland v. Boyle,* 244 U. S. 106, 110; *Prendergast v. New York Tel. Co.,* 262 U. S. 43, 51; *Brooklyn Union Gas Co. v. Nixon,* 2 F. (2d) 118.

The short answer to appellees' contention here is, of course, the retroactive effect of the order. All of 1932 and half of 1933 had passed when the order was entered and even a refund of appellant's entire charge could not increase the business already done. As was aptly said by the Supreme Court of Wisconsin in *Wisconsin-Minnesota Light & Power Co. v. Commission,* 183 Wis. 104,

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[56]—*Continued*—
business since 1910 (R. 113, 124-125); and of Strange, appellant's vice president in charge of distribution operation, with twenty-eight years of experience in the public utility business, electric, manufactured and natural gas (R. 338-339). Strange testified, giving specific figures, that the inhabitants of the areas from which Martin said the additional customers would come—using gas for the purposes and with the appliances to which Martin had testified—would save a total of about 75 cents a year if the rate were 55 cents instead of 75 cents (R. 343-345).

[56]Reduction in gas rates in Amarillo, Texas, in 1931 by 24.52 per cent reduced revenues by 23.34 per cent (R. 339-343). Studies in other cities situated in the same general part of Texas as Laredo showed that variation in domestic gas rates from 50c to $1 per 1000 cubic feet had no appreciable effect on consumption (R. 342).

105-106, a case where the lower rates were to apply in a past period:

> "In setting aside the existing rate the Commission cannot substitute for the experience of the company its estimates as to future revenues and operating costs. The net earnings of the company for the year ending October 31, 1921, was a completed operation. Estimates as to revenues could not change the fact as it existed."

Furthermore, as emphasizing the inapplicability of the so-called "test" cases, it is to be remembered that in this case confiscation appeared on the face of the record before the Court of Civil Appeals by definite, certain, indisputable facts. This showing did not depend upon "whether the evidence requires the conclusion that by reason of the inadequacy of the valuation the result is confiscation," *Los Angeles Gas Corp. v. Commission,* 289 U. S. 287, 315-316, nor upon whether such conclusion was required from the rate of depreciation reserve accrual or the rate of return fixed by the Commission. *United Railways v. West,* 280 U. S. 234, 249-254. Nor was confiscation to be found only upon "elaborate estimates and computations" inconsistent with appellant's experience, or only by sustaining amounts it charged to operating expenses for depreciation, *Lindheimer v. Illinois Bell Tel. Co., supra,* page 175, or upon upholding, through the testimony of friendly experts, the city gate price charged for gas by an affiliated company, *Dayton Power & Light Co. v. Commission,* 292 U. S. 290, 295-303. And least of all, did the showing depend upon the effect of national legislation and upon a mere estimate, with accurate proof avail-

able, of 1933 earnings which was what the judges considered "no sufficient showing" for not testing the disputed rates in *St. Joseph Stock Yards Co. v. United States,* 11 F. Supp. at 325.

Finally, a word must be said with respect to the statement that:

> "If actual experience for a proper period of time under the rate complained of should reveal sufficient reasons, the rate order may be changed through proper channels" (R. 422).

Here again the Court of Civil Appeals was merely paraphrasing the language of the *St. Joseph Stock Yards Case,*[59] without regard for the fact that the "channels" open to the appellant here and the company there were entirely different. See 7 U. S. C. 207(e), 217; 28 U. S. C. 46, 47. As heretofore mentioned, under the state law the Railroad Commission loses jurisdiction of the subject matter while the validity of its order is in litigation, and is without power to grant relief from the effect of its order as to past transactions.[60] The judgment of the Court of Civil Appeals did not become final until December 30, 1936, when the Supreme Court of Texas denied appellant's motion for rehearing on its application for a writ of error (R. 479). If, when the judgment became final, appellant had yielded to its terms, appellant would have had to make refunds for 1932 and 1933, thereby suffering confiscation shown by undisputed evidence,

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[59] "If actual experience hereafter for a proper period under the rates fixed by the order reveals sufficient reasons, the order can then be challenged through the proper channels." (11 F. Supp. 325).

[60] *Supra,* p. 49, Note 39.

and would have had to make refunds for 1934, 1935, and 1936 without even the opportunity of presenting evidence to any forum of the effect on its earnings of the refunds for those years. The making of these refunds might well wreck the company, yet no "channel" is pointed out by the Court through which relief could be obtained if such were the case. If, however, appellant was able to make the refunds and still remain a going concern, the "channel" for relief from further confiscation would still be far distant. According to the opinion below the experience of the company in its actual operations does not reach the dignity of evidence with respect to the issue of confiscation unless the lower prescribed rate is actually charged for a period sufficient to "determine the matters which are of doubtful or uncertain influence"—perhaps five years or more (R. 421). Because of this ruling appellant could not, at any time in the near future, go back to the Commission with any reasonable hope for an increase in its rates. The Court of Civil Appeals used words from the *St. Joseph Stock Yards* decision, but those words were meaningless, because they did not fit the facts.

IX.

The Court Below Failed To Give Appellant That Independent Consideration of Both The Facts and The Law Which Is Essential to The Proper Judicial Review of a Rate Order Claimed To Be Confiscatory.[61]

From the inception of this controversy until the pres-

[61] Assignment 12 (R. 512, 1410).

ent time appellant has never had any adequate consideration of its rights under the Federal Constitution. Appellant's domestic rates were summarily reduced from 75 cents to 40 cents by the city council of Laredo, and its petition for an increase in existing rates on the ground that they were confiscatory was wholly ignored by the city officials (R. 11). Appealing from both actions, appellant was accorded a hearing before the Commission which resulted in an opinion and order which was so drawn as to conceal and confuse rather than to enlighten and inform (R. 9-25).[62] Appellant's motion for detailed findings as to the principal items of its property was ignored (R. 235), and appellant was left without any means of knowing how the Commission's valuation of $885,000 was reached. Other rate regulatory bodies, where the rights to be determined make a full hearing necessary, as well as the lower federal courts, have been required to make those findings which are essential to inform the parties, as well as the appellate courts, whether rights guaranteed by the Constitu-

[62]For example, the sections of the opinion headed "Distribution System" (R. 16), "Going Concern Value" (R. 17), and "General Overheads" (R. 21) are nothing more than a statement of the opposing contentions of the parties. The West Jennings gathering system and the pipe lines of the Jennings field were said to be included in the $885,000 valuation, but at what amount the Commission did not state (R. 24-25). Because of the inclusion of these items, and in an attempt to apply *Los Angeles Gas Corp. v. Commission*, 289 U. S. 287, *in limine*, no allowance was made for going concern value (R. 25). If the statements of the Commission be taken at face value, this pipe line and gathering system should be excluded and going value included. Because of the inclusion of the Jennings lines the over-all per cent condition of appellant's properties was reduced (R. 19). Operating expenses actually incurred were rejected and a "reasonable allowance" therefor substituted without statement of what that allowance was (R. 24).

tion have been respected.[63] It was the duty of the Commission to enter an order such that the courts and appellant could understand from that order why the Commission had acted as it did, *Norwegian Nitrogen Co. v. United States,* 288 U. S. 294, 319, since appellant's constitutional rights depended upon what the facts were found to be. *Prentis v. Atlantic Coast Line,* 211 U. S. 210, 228.

Thus the matter came before the courts below upon prior legislative proceedings which were fundamentally erroneous. Instead of the errors being corrected by the courts, they have merely been perpetuated and others added to them. After appellees had succeeded in preventing the case from being heard in the federal court on the equity docket, appellant found itself compelled to present all its testimony, including all accounting, engineering and other proof of a technical nature, to a petit jury. Despite the recognized inability of such a

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[63] Cf. *Florida v. United States,* 282 U. S. 194, 215; *United States v. Baltimore & Ohio R. Co.,* 293 U. S. 454, 462-465; *Helvering v. Rankin,* 295 U. S. 123, 131; *Railroad Commission v. Maxcy,* 281 U. S. 82; *Public Service Commission v. Wisconsin Telephone Co.,* 289 U. S. 67, 70; *Public Service Commission v. Northern Indiana Public Service Co.,* 289 U. S. 703. In *Pennsylvania Power & Light Co. v. Public Service Commission,* 193 Atl. 427, 437, the Supreme Court of Pennsylvania said with respect to a statute of that state requiring such findings:

> "This is but a recognition of a fundamental principle that where the Legislature delegates powers to an extrajudicial tribunal appointed to determine property values or rights and the tribunal acts in such matters, it must make such findings that on a review by the court it is possible to determine whether one affected by such determination has been deprived of legal rights."

And see *Federal Equity Rule* 70½ and amendment thereto, 296 U. S. 671.

body to deal adequately with proof of that nature (*Ex parte Young*, 209 U. S. 123, 164), despite appellant's vigorous protests and efforts to extricate itself from this situation (R. 52-53), the trial judge constituted himself a mere umpire in the matter and in the end delegated the answering of all questions of law as well as fact to the jurors by asking them to say whether the reduced rate was "unreasonable and unjust" to appellant (R. 382). If a petit jury has any place at all in a trial like this, it can only be to resolve conflicting issues of fact. However, the trial court refused to permit the jury to be used for this purpose (R. 373-379), preferring to submit to the jury only the ultimate question which he alone was called upon to decide. Upon the jury's pronouncement that the reduced rate was not "unreasonable and unjust," there followed a judgment permanently enjoining appellant from thereafter charging any other rate until the Railroad Commission or other duly constituted authority had changed or modified the rate order (R. 391).

Having been given this opportunity of proof before a tribunal which heard but would not heed,[64] appellant took its case to a tribunal which, in the legal sense, did not even hear. All of appellant's assignments specifically complaining that it had been deprived of its rights under the Federal Constitution by the refusal of the court below to permit findings of fact with respect to value etc., were dismissed from the case as involving

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[64]Cf. *Oregon Railroad & Navigation Co. v. Fairchild*, 224 U. S. 510, 525; *Interstate Commerce Commission v. Louisville & Nashville Railroad*, 227 U. S. 88, 91; *Chicago Junction Case*, 264 U. S. 258, 265.

mere "questions of practice" (R. 414). The appellate court then refused to make any such findings of its own, despite this court's holding that the Federal Constitution assures to appellant not only "the right to introduce evidence" but to "have judicial findings based upon it." *Baltimore & Ohio R. Co. v. United States,* 298 U. S. at 369. Instead, the Court of Civil Appeals simply ignored appellant's evidence, ignored the valuation fixed by the Commission, used only certain portions of the testimony proffered by appellees, treated as conclusive the estimate of one witness as to value, made certain calculations, some erroneous, in the light of which and because of appellant's "failure" to make a test of the new rate which it could not possibly make, the court on appeal reached the conclusion that, as a matter of law, appellant's evidence failed to show confiscation (R. 421-426). The presumption in favor of the validity of the order was thus given irrebuttable effect, since, under the ruling, the presumption could be met only by proof of the result of actually charging the reduced rate, although the rate was not in existence for most of the period in question and therefore could not have been charged. Under this ruling, appellant's evidence with respect to the undervaluation of its property, no matter how cogent and compelling, was held immaterial and on this basic issue all that had any relevancy was the lowest over-all opinion estimate to be found in the record.

Having thus avoided any review whatever of appellant's evidence, the Court proceeded to reverse the action of the trial court and order refunds for the years 1932 and 1933, despite the undisputed evidence that

after making such refunds, the 55 cent rate would leave appellant practically without compensation for the use of its property in those years, and despite the fact that there was no evidence whatever with respect to the effect of the refunds upon appellant's return during 1934 and 1935, during which years this suit was in progress.

Because of the unrevealing character of the Commission's findings and conclusions, it was all the more important that the court below make the kind of review of the facts which the Constitution requires. If appellant is to be deprived of its property, it is at least entitled to know how that result was accomplished.

What has been accorded appellant is not a judicial review in any real sense, certainly not the independent judicial inquiry which this Court has clearly defined and required in a case of this kind, but only a search of the record for something in the form of testimony, irrespective of cogency or reliability, by which the Commission might be upheld. This has been accomplished through the use of phrases and legal abstractions culled from the opinion of other courts, but without reference to the facts before those other courts which gave their language the quality of valid pronouncements of law. This refusal of an independent review of the facts and the law was in itself a denial of due process, requiring reversal. *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 49-54.

CONCLUSION

It is respectfully submitted that the rate order should be held repugnant to the Constitution and that the judgment upholding that order should be reversed.

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APPENDIX

REVISED CIVIL STATUTES OF TEXAS, 1925

TITLE 28—*Cities, Towns and Villages*—

"CHAPTER 13—*Home Rule Art. 1175. Enumerated Powers.*—Cities adopting the charter or amendment hereunder shall have full power of local self-government, and among the other powers that may be exercised by any such city the following are hereby enumerated for greater certainty:

"12 * * * To determine, fix and regulate the charges, fares or rates of any person, firm or corporation enjoying or that may enjoy the franchise or exercising any other public privilege in said city and to prescribe the kind of service to be furnished by such person, firm or corporation, and the manner in which it shall be rendered, and from time to time alter or change such rules, regulations and compensation; provided that in adopting such regulations and in fixing or changing such compensation, or determining the reasonableness thereof, no stock or bonds authorized or issued by any corporation enjoying the franchise shall be considered unless (on) proof that the same have been actually issued by the corporation for money paid and used for the development of the corporate property, labor done or property actually received in accordance with the laws and Constitution of this State applicable thereto. In order to ascertain all facts necessary for a proper understanding of what is or should be a reasonable rate or regulation, the governing authority shall have full power to inspect the books and compel the attendance of witnesses for such purpose. * * *" (Acts 1921, p. 169.)

"CHAPTER 10—*Public Utilities—Art. 1124. Rates in Certain Cities.*—Any city having a special charter or a charter adopted or amended under the pro-

visions of chapter 13 of this title, and having authority under its charter to determine, fix and regulate the charges, fares or rates of compensation to be charged by any person, firm or corporation enjoying a franchise in said city, shall in determining, fixing and regulating such charges, fare or rates of compensation, base the same upon the fair value of the property of such person, firm or corporation devoted to furnishing service to such city, or the inhabitants thereof, and not upon any stocks or bonds issued or authorized to be issued, by, or any other indebtedness of, such person, firm or corporation. No city shall be responsible for, concerned with, authorize, approve or have jurisdiction over, the issuance or sale of any stocks or bonds by any such person, firm or corporation, but the issuance and sale thereof shall be governed solely by the Constitution and laws of this State applicable thereto." (Acts 1st C. S. 1921, p. 152.)

TITLE 102—OIL AND GAS—*Natural Gas*—

"ART. 6052. *Utility office.*—Every gas utility as defined herein shall have an office in one of the counties of this State in which its property or some part thereof is located and shall keep in said office all books, accounts, papers, records, vouchers and receipts which the Commission shall require. No books, accounts, papers, records, receipts, vouchers or other data required by the Commission to be so kept shall be at any time removed from this State except upon such conditions as the Commission may prescribe." (Acts 3rd C. S. 1920, p. 18.)

"ART. 6058. *Appeal from city control.*—When a city government has ordered any existing rate reduced, the gas utility affected by such order may appeal to the Commission by filing with it on such terms and conditions as the Commission may direct, a petition and bond to review the decision, regula-

tion, ordinance, or order of the city, town or municipality. Upon such appeal being taken the Commission shall set a hearing and may make such order or decision in regard to the matter involved therein as it may deem just and reasonable. The Commission shall hear such appeal *de novo*. Whenever any local distributing company or concern, whose rates have been fixed by any municipal government, desires a change of any of its rates, rentals or charges, it shall make its application to the municipal government where such utility is located and such municipal government shall determine said application within sixty days after presentation unless the determination thereof may be longer deferred by agreement. If the municipal government should reject such application or fail or refuse to act on it within said sixty days, then the utility may appeal to the Commission as herein provided. But said Commission shall determine the matters involved in any such appeal within sixty days after the filing by such utility of such appeal with said Commission or such further time as such utility shall in writing agree to, but the rates fixed by such municipal government shall remain in full force and effect until ordered changed by the Commission." (Acts 3rd C. S. 1920, p. 18.)

"ART. 6059. *Appeal from orders.*—If any gas utility or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the Commission, such dissatisfied utility or party may file a petition setting forth the particular cause of objection thereto in a court of competent jurisdiction in Travis County against the Commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature and shall be tried and determined as other civil causes in said court. Either party to said action may have the right of appeal; and said appeal shall be at once

returnable to the appellate court, and said action so appealed shall have precedence in said appellate court of all causes of a different character therein pending. If the court be in session at the time such right of action accrues, the suit may be filed during such term and stand ready for trial after ten days notice. In all trials under this article the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations, orders, classifications, acts or charges complained of are unreasonable and unjust to it or them." (Acts 3rd C. S. 1920, p. 18.)

TITLE 42—COURTS—*Practice in District and County*—

CHAPTER 8—*Trial of Causes.*

4. *Charge of the Court.*

"ART. 2185. *Requisites.*—The charge shall be in writing, signed by the judge, filed with the clerk, and shall be a part of the record of the cause. It shall be prepared after the evidence has been concluded and shall be submitted to the respective parties or their attorneys for inspection, and a reasonable time given them in which to examine and present objections thereto, which objections shall in every instance be presented to the court before the charge is read to the jury, and all objections not so made and presented shall be considered as waived. Failure of the court to give reasonable time to the parties or their attorneys for examination of the charge shall be reviewable upon appeal upon proper exception. The judge shall so frame his charge as to distinctly separate questions of law from questions of fact, and not therein comment on the weight of the evidence, and so as to instruct the jury as to the law arising on the facts, and shall only submit controverted questions of fact." (Acts 1913, p. 113.)

"ART. 2189. *Special Issues.*—In all jury cases the court may submit said cause upon special issues without request of either party, and, upon request of either party, shall submit the cause upon special issues raised by the pleadings and the evidence in the case. Such special issues shall be submitted distinctly and separately. Each issue shall be answered by the jury separately. In submitting special issues the court shall submit such explanations and definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues. If the nature of the suit is such that it cannot be determined on the submission of special issues, the court may refuse the request to do so, but the action of the court in refusing may be reviewed on proper exception in the appellate court, and this article shall be construed in connection with the succeeding article." (Acts 1913, p. 113.)

6. *Verdict.*

"ART. 2202. *Definition and substance.*—A verdict is a written declaration by a jury of its decision of the issues submitted to them in the case.

"1. It shall be signed by the foreman of the jury and shall comprehend the whole or all the issues submitted to it.

"2. The verdict is either a general or special verdict.

"3. The jury shall render a general or special verdict as the court may direct.

"* * *

"5. A special verdict is one wherein the jury finds the facts only on issues made up and submitted to them under the direction of the court.

"6. A special verdict found under the provisions of this article shall, as between the parties, be conclusive as to the facts found." (Acts 1846, p. 363; Acts 1st C. S. 1897, p. 15; Acts 1913, p. 113; G. L. Vol. 2, p. 1669.)